(9)

No. 94-251-CFY
Status: GRANTED

Title: United States, Petitioner
v.
Juan Paul Robertson

Docketed:
August 10, 1994

Court: United States Court of Appeals for the Ninth Circuit

Counsel for petitioner: Solicitor General

Counsel for respondent: Warren,Glenn Stewart

7-15-94 ext til 8-24-94, J. O'Connor, CITED.

Entry	Date	Note	Proceedings and Orders
1	Jul 14 1994	G	Application (A94-25) to extend the time to file a petition for a writ of certiorari from July 25, 1994 to August 24, 1994, submitted to Justice O'Connor.
2	Jul 15 1994		Application (A94-25) granted by Justice O'Connor extending the time to file until August 24, 1994.
3	Aug 10 1994	G	Petition for writ of certiorari filed.
5	Sep 13 1994		Brief of respondent Juan Paul Robertson in opposition filed.
6	Sep 13 1994	G	Motion of respondent for leave to proceed in forma pauperis filed.
4	Sep 22 1994		Reply brief of petitioner filed.
7	Sep 28 1994		DISTRIBUTED. October 14, 1994 (Page 2)
8	Oct 17 1994		Motion of respondent for leave to proceed in forma pauperis GRANTED.
9	Oct 17 1994		Petition GRANTED.
			**********
10	Oct 24 1994	G	Motion of respondent for appointment of counsel filed.
11	Oct 31 1994		DISTRIBUTED. November 4, 1994 (Page 16)
12	Nov 7 1994		Motion for appointment of counsel GRANTED and it is ordered that Glenn Stewart Warren, Esqiure, of San Diego, California, is appointed to serve as counsel for the respondent in this case.
13	Dec 1 1994		Joint appendix filed.
14	Dec 1 1994		Brief of petitioner United States filed.
16	Dec 7 1994		Order extending time to file brief of respondent on the merits until January 10, 1995.
17	Dec 21 1994		SET FOR ARGUMENT MONDAY, FEBRUARY 27, 1995. (1ST CASE).
18	Dec 23 1994		CIRCULATED.
19	Jan 10 1995		Brief of respondent Juan Paul Robertson filed.
20	Jan 10 1995	X	Brief amicus curiae of National Association of Criminal Defense Lawyers filed.
21	Feb 9 1995		Record filed.
		*	Partial record proceedings United States Court of Appeals for the Ninth Circuit.
22	Feb 10 1995	X	Reply brief of petitioner filed.
23	Feb 14 1995		Record filed.
		*	Original record proceedings United States District Court for the Southern District of California (BOX)
24	Feb 27 1995		ARGUED.

1PP

Supreme Court, U.S.
FILED

(1)

No. 94-251 AUG 10 1994

OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1994

UNITED STATES OF AMERICA, PETITIONER

v.

JUAN PAUL ROBERTSON

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

DREW S. DAYS, III
Solicitor General

JO ANN HARRIS
Assistant Attorney General

WILLIAM C. BRYSON
Deputy Solicitor General

MIGUEL A. ESTRADA
Assistant to the Solicitor General

Department of Justice
Washington, D.C. 20530
(202) 514-2217

BEST AVAILABLE COPY

57 pp

QUESTION PRESENTED

Whether the interstate movement of goods and people in connection with the operation of a gold mine is sufficient to justify the conclusion that the activities of the gold mine affect interstate commerce within the meaning of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. 1962(a).

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Constitutional and statutory provisions involved	2
Statement	2
Reasons for granting the petition	6
Conclusion	16
Appendix A	1a
Appendix B	37a

TABLE OF AUTHORITIES

Cases:

FTC v. *Fred Meyer, Inc.*, 390 U.S. 341 (1968)	14
Heart of Atlanta Motel, Inc. v. *United States*, 379 U.S. 241 (1964)	10
Hodel v. *Indiana*, 452 U.S. 314 (1981)	10
Katzenbach v. *McClung*, 379 U.S. 294 (1964)	10, 11
NLRB v. *Reliance Fuel Oil Corp.*, 371 U.S. 224 (1963)	9
Russell v. *United States*, 471 U.S. 858 (1985)	9, 12
Russello v. *United States*, 464 U.S. 16 (1983)	13
Scarborough v. *United States*, 431 U.S. 563 (1977)	9, 10, 12
Stirone v. *United States*, 361 U.S. 212 (1960)	9
Summit Health, Ltd. v. *Pinhas*, 500 U.S. 322 (1991)	15
United States v. *Allen*, 656 F.2d 964 (4th Cir. 1981)	7
United States v. *Altomare*, 625 F.2d 5 (4th Cir. 1980)	8, 12
United States v. *American Bldg. Maintenance Indus.*, 422 U.S. 271 (1975)	9
United States v. *Barton*, 647 F.2d 224 (2d Cir.), cert. denied, 454 U.S. 857 (1981)	8
United States v. *Borromeo*, 954 F.2d 245 (4th Cir.), cert. denied, 112 S. Ct. 3012 (1992)	8
United States v. *Brown*, 959 F.2d 63 (6th Cir. 1992)	9
United States v. *Butt*, 955 F.2d 77 (1st Cir. 1992)	9-10

Cases—Continued: Page

United States v. *Calder*, 641 F.2d 76 (2d Cir.), cert. denied, 451 U.S. 912 (1981) 10
United States v. *Conn*, 769 F.2d 420 (7th Cir. 1985) 8
United States v. *Culbert*, 435 U.S. 371 (1978) 9
United States v. *Darby*, 312 U.S. 100 (1941) 10, 12
United States v. *Doherty*, 867 F.2d 47 (1st Cir.), cert. denied, 492 U.S. 918 (1989) 7, 12
United States v. *Farmer*, 924 F.2d 647 (7th Cir. 1991) 8
United States v. *Gambino*, 566 F.2d 414 (2d Cir. 1977), cert. denied, 435 U.S. 952 (1978) 10
United States v. *Long*, 651 F.2d 239 (4th Cir.), cert. denied, 454 U.S. 896 (1981) 8
United States v. *Mannino*, 635 F.2d 110 (2d Cir. 1980) ... 8
United States v. *McManigal*, 708 F.2d 276 (7th Cir.), vacated, 464 U.S. 979 (1983) 11, 12
United States v. *Muskovsky*, 863 F.2d 1319 (7th Cir. 1988), cert. denied, 489 U.S. 1067 (1989) 7, 11
United States v. *Norton*, 867 F.2d 1354 (11th Cir.), cert. denied, 491 U.S. 907 (1989) 7
United States v. *Robinson*, 763 F.2d 778 (6th Cir. 1985) .. 7, 11
United States v. *Stratton*, 649 F.2d 1066 (5th Cir. 1981) 7
United States v. *Sullivan*, 332 U.S. 689 (1948) 10
United States v. *Turkette*, 452 U.S. 576 (1981) 13, 14
United States v. *Women's Sportswear Mfrs. Ass'n*, 336 U.S. 460 (1949) 11
United States v. *Wrightwood Dairy Co.*, 315 U.S. 110 (1942) 10, 11
Wickard v. *Filburn*, 317 U.S. 111 (1942) 10, 11

Constitution and statutes:

U.S. Const. Art. I, § 8, Cl. 3 (Commerce Clause) 2, 10, 13
Age Discrimination in Employment Act, 29 U.S.C. 630(b) 15
Hobbs Act, 18 U.S.C. 1951 9

Statutes—Continued: Page

Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. 1961 *et seq.*:
18 U.S.C. 1962(a) 2, 5, 6, 9
18 U.S.C. 1963 5
7 U.S.C. 608(b) (Supp. V 1993) 15
18 U.S.C. 844(i) 9, 15
18 U.S.C. 1365(a) 15
21 U.S.C. 841(a)(1) 2, 5
21 U.S.C. 843(b) 5
21 U.S.C. 846 ..... 2, 5
21 U.S.C. 848 5
27 U.S.C. 213 15
29 U.S.C. 151 15
42 U.S.C. 274e(a) 16
42 U.S.C. 2000a(b) 16
49 U.S.C. App. 2001(3) 16

Miscellaneous:

S. Rep. No. 617, 91st Cong., 1st Sess. (1969) 13

In the Supreme Court of the United States

OCTOBER TERM, 1994

No.

UNITED STATES OF AMERICA, PETITIONER

v.

JUAN PAUL ROBERTSON

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App., *infra*, 1a-36a) is reported at 15 F.3d 862.

JURISDICTION

The judgment of the court of appeals was entered on February 1, 1994. The court of appeals denied a petition for rehearing on April 26, 1994. App., *infra*, 37a-38a. On July 15, 1994, Justice O'Connor extended the time for filing a petition for a writ of certiorari to and including August 24, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Commerce Clause of the Constitution, Article I, Section 8, Clause 3, provides: "The Congress shall have Power * * * [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

2. The Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. 1962(a), provides: "It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity * * * to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce."

STATEMENT

Following a jury trial in the United States District Court for the Southern District of California, respondent was convicted of one count of conspiracy to possess cocaine with intent to distribute it, in violation of 21 U.S.C 846, three counts of possession of cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1), and one count of investing the proceeds from a pattern of racketeering in an enterprise affecting interstate commerce, in violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1962(a). He was sentenced to concurrent terms of 20 years' imprisonment on each of the five counts. The court of appeals affirmed the narcotics convictions, but reversed the RICO conviction. App., *infra*, 1a-36a.

1. Respondent is a former Assistant United States Attorney who became a criminal defense lawyer in Los Angeles, California. He specialized in defending narcotics cases, and eventually became involved in the narcotics trade. On November 15, 1983, respondent was retained to represent Julio Silva-Lopera (Silva), who had been arrested on a cocaine charge by agents of the Drug Enforcement Administration. Silva told respondent that he had two kilograms of cocaine and $980,000 in the trunk of his Cadillac. Silva instructed respondent to have Silva's wife place the Cadillac in storage until Silva was released from jail. Respondent assured Silva that he would take care of the matter. App., *infra*, 2a-3a; Tr. 61-76, 363-364.

Instead of complying with Silva's request, respondent stole the Cadillac and its contents. On November 22, 1983, respondent drove the Cadillac to the home of his estranged wife in Phoenix, Arizona. Respondent's wife, a former federal probation officer in Los Angeles, saw cocaine and a large amount of money in the trunk. Respondent instructed her to open a safe deposit box at a Phoenix bank and deposit the money, which she and her father estimated to be a half million dollars. Respondent also instructed her to make deposits of less than $10,000 into different banks in the Phoenix area. Respondent told Silva that he had been unable to locate the car; Silva then fired respondent and hired new counsel. App., *infra*, 3a; Tr. 77-80, 371-380.

In February 1984, respondent quit the practice of law in California and reconciled with his wife. Respondent and his wife purchased a house near Phoenix for $270,000 in cash; they also made additional large cash purchases totaling $700,000. App., *infra*, 3a; Tr. 383-405.

Respondent and his wife separated again in the Fall of 1984. In January 1985, respondent moved into the home

of Richard and Janet Horchler, where he continued his drug trafficking activities. The Horchlers saw respondent with several hundred thousand dollars and large quantities of cocaine. Respondent wore rubber gloves when counting the money, telling Janet Horchler that he could not leave fingerprints on it. App., *infra*, 4a; Tr. 824-826, 967-969.

Respondent agreed to finance a partnership with the Horchlers to mine gold in Alaska. A partnership agreement was drawn up between respondent and Richard Horchler's son, Robert. Respondent paid in cash for placer gold mining claims near Fairbanks, Alaska ($125,000), mining equipment (approximately $100,000), and the traveling expenses for seven employees to go to Alaska. Some of the equipment was purchased in Los Angeles and transported to Alaska. When Robert Horchler exhausted the cash initially given to him by respondent, Horchler flew to Arizona, where respondent gave him an additional $55,000. When that money ran out, respondent mailed an additional $25,000. Respondent telephoned Robert Horchler from Arizona on a number of occasions to check on the progress of the mine. App., *infra*, 4a-5a; Tr. 612, 615-616, 906-907, 913-914.

The partnership with the Horchlers was dissolved during the first mining season, but respondent continued the mining operation through 1987 as the Robertson Mining Co. In 1986, respondent financed the mine's expenses by means of a $300,000 loan, secured by a mortgage on the house in Phoenix. Respondent again hired a number of employees from outside Alaska to work in the mine and he also purchased a small airplane for flying to and from Alaska. Silva's Cadillac was driven to Alaska for use in the mining operation. The mine produced between $200,000 and $290,000 worth of gold.

Most of the gold was sold in Alaska, although respondent took approximately $30,000 worth of gold nuggets out of the State. Throughout the period of ownership, respondent and his employees traveled between Alaska and the lower 48 States. App., *infra*, 4a-5a; Tr. 455-463, 608-611, 774-784, 898-900, 911, 1296-1299, 1706, 1722-1723, 1749.

2. On October 17, 1991, a federal grand jury returned an eight-count indictment against respondent charging him with conspiracy to possess cocaine with intent to distribute it, in violation of 21 U.S.C. 846 (Count 1); possession of cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1) (Counts 2 through 4); use of a communications facility in furtherance of a narcotics felony, in violation of 21 U.S.C. 843(b) (Count 5); investing proceeds from a pattern of racketeering activity in an enterprise the activities of which affected interstate commerce (*i.e.*, the gold mine in Alaska), in violation of 18 U.S.C. 1962(a) (Count 6); RICO forfeiture, 18 U.S.C. 1963 (Count 7); and conducting a continuing criminal enterprise, in violation of 21 U.S.C. 848 (Count 8). The jury found respondent guilty on Counts 1 through 4 and on Count 6, but not guilty on Counts 5 and 8. The jury did not reach a decision on the forfeiture charged in Count 7; that count was later dismissed. Respondent was sentenced to 20 years' imprisonment to run concurrently on all counts.[1] App., *infra*, 6a-7a.

---

[1] The district court declined to sentence respondent under the Sentencing Guidelines for his RICO conviction, which would have resulted in the sentence on that count being nonparolable. The government appealed the court's refusal to apply the Guidelines to the RICO conviction, but the court of appeals did not reach the government's appeal, because of its reversal of the RICO conviction.

3. The court of appeals affirmed respondent's narcotics convictions but reversed his RICO conviction. The court held that the government failed to prove that the "enterprise"—the gold mine—was engaged in interstate or foreign commerce, or that its activities "affected" interstate or foreign commerce, as required by RICO. See 18 U.S.C. 1962(a). The court of appeals acknowledged that a "minimal" effect on interstate commerce is sufficient to satisfy RICO, but it stated that an "incidental" effect on commerce would not suffice. The court found no evidence that any of the gold produced by the mine was sold outside of Alaska. App., *infra*, 7a-9a. The court also found respondent's purchase of supplies and equipment and his hiring of personnel outside of Alaska insufficient to establish an effect on interstate commerce. The court explained:

> Given that Alaska is fairly isolated, most supplies must be shipped there via interstate commerce. Carried to its logical conclusion, the Government's argument would require us to find that any local Alaskan operation has an effect on interstate commerce merely because supplies, equipment and employees are shipped there. We decline to do so.

Id. at 10a. Finally, the court declined to give weight to respondent's travel to and from Alaska and the use of the Cadillac in the mining operation, noting that those activities "had, at most, only an incidental effect on interstate commerce." *Ibid.*

REASONS FOR GRANTING THE PETITION

1. The Ninth Circuit's decision conflicts with numerous decisions of other circuits on the interstate commerce issue. Contrary to the Ninth Circuit's decision in this case, other circuits have recognized that

RICO's requirements are fully satisfied by a showing that the enterprise purchased supplies or hired employees from outside the State, or that its activities otherwise caused persons or property to travel across state lines. See, *e.g.*, *United States* v. *Doherty*, 867 F.2d 47, 68 (1st Cir.) (Breyer, J.) (in case involving theft of police exams, "evidence that the appellants' activities may have prevented out-of-state applicants from obtaining jobs * * *; that the [Massachusetts victim] replaced its locks with locks ordered from Philadelphia; and that an out of state consultant developed and graded some exams, is a stronger showing of effects on commerce" than required by RICO case law), cert. denied, 492 U.S. 918 (1989); *United States* v. *Norton*, 867 F.2d 1354, 1359 (11th Cir.) (interstate commerce affected when union officials traveled between Florida and Illinois), cert. denied, 491 U.S. 907 (1989); *United States* v. *Muskovsky*, 863 F.2d 1319, 1325 (7th Cir. 1988) (interstate nexus satisfied "simply because [the enterprise] purchases supplies and office equipment from companies located out of Illinois"), cert. denied, 489 U.S. 1067 (1989); *United States* v. *Robinson*, 763 F.2d 778, 781 (6th Cir. 1985) (sale of "alcohol * * * manufactured out of state" provided "a sufficient impact upon interstate commerce for purposes of" RICO); *United States* v. *Allen*, 656 F.2d 964, 964 (4th Cir. 1981) (per curiam) ("the supplies used in Allen's bookmaking operations which originated outside of Maryland provided a sufficient nexus between the enterprise and interstate commerce to invoke RICO"); *United States* v. *Stratton*, 649 F.2d 1066, 1075 & n.12 (5th Cir. 1981) (evidence that out-of-state litigants appeared before the state-court "enterprise," that a local attorney "at times" was involved in extradition proceedings, and that the court purchased office supplies from outside the State

constituted "more than ample evidence of the [court's] connection with interstate commerce"); *United States* v. *Mannino*, 635 F.2d 110, 118 (2d Cir. 1980) (in connection with the activities of the enterprise, New York resident purchased house in New Jersey).[2] The Ninth Circuit stands alone in its restrictive interpretation of RICO's requirement of a nexus with interstate commerce.

2. Nothing in the text of RICO supports the Ninth Circuit's view that "[t]he purchase of 'equipment and supplies drawn generally from the stream of interstate commerce' is insufficient to establish the interstate nexus required under RICO." App., *infra*, 9a-10a. RICO covers not only enterprises engaged in interstate or foreign commerce, but also enterprises "the activities of which affect" such commerce. As this Court has

---

[2] See also *United States* v. *Borromeo*, 954 F.2d 245, 248 (4th Cir.) (enterprise "ordered controlled substances from Ohio and Maryland"), cert. denied, 112 S. Ct. 3012 (1992); *United States* v. *Farmer*, 924 F.2d 647, 651 (7th Cir. 1991) (drug scales were manufactured in another State); *United States* v. *Conn*, 769 F.2d 420, 424 (7th Cir. 1985) (enterprise "purchased equipment and office supplies from companies outside the State of Illinois"); *United States* v. *Long*, 651 F.2d 239, 241-242 (4th Cir.) (state senator's office affected interstate commerce because senator served as a member of the committee that appropriated the funds used for operating expenses and purchases by state agencies, including the agency responsible for licensing liquor coming into the State through interstate commerce), cert. denied, 454 U.S. 896 (1981); *United States* v. *Barton*, 647 F.2d 224, 234 (2d Cir.) (restaurant purchased less liquor and fish from other countries), cert. denied, 454 U.S. 857 (1981); *United States* v. *Altomare*, 625 F.2d 5, 8 (4th Cir. 1980) (activities of state prosecutor's office sufficiently affected interstate commerce when interstate telephone calls were placed from that office, supplies and materials used by the office originated outside the State, and out-of-state residents were involved in litigation with the office).

repeatedly noted, Congress is aware of the distinction between legislation limited to activities "in commerce" and the more expansive legislation covering activities that "affect commerce." *Russell* v. *United States*, 471 U.S. 858, 859 n.4 (1985);[3] *Scarborough* v. *United States*, 431 U.S. 563, 571 (1977); *United States* v. *American Bldg. Maintenance Indus.*, 422 U.S. 271, 280 (1975). When Congress employs the phrase "affecting interstate commerce," it "expresses an intent * * * to exercise its full power under the Commerce Clause." *Russell*, 471 U.S. at 859. See also *NLRB* v. *Reliance Fuel Oil Corp.*, 371 U.S. 224, 226 (1963) (by using the phrase "affecting commerce," Congress intended to exercise "the fullest jurisdictional breadth constitutionally permissible under the Commerce Clause") (emphasis omitted).[4]

---

[3] In *Russell*, this Court unanimously rejected the claim that the attempted arson of a two-unit apartment building, which the defendant owned and held for use as rental property, did not have a sufficient effect on interstate commerce to warrant conviction under 18 U.S.C. 844(i). Section 844(i), which was part of the same statute that enacted RICO, requires proof that the property was "used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce."

[4] In this regard, RICO's reach is similar to that of the Hobbs Act, 18 U.S.C. 1951. Compare 18 U.S.C. 1962(a) ("any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce") with 18 U.S.C. 1951 ("obstructs, delays, or affects commerce"). Following this Court's lead, the courts of appeals have uniformly interpreted the Hobbs Act to reach the activities of even the smallest local enterprises. See, *e.g.*, *United States* v. *Culbert*, 435 U.S. 371, 373 (1978) ("These words do not lend themselves to restrictive interpretation; as we have recognized, they 'manifest . . . a purpose to use all the constitutional power of Congress to punish interference with interstate commerce.'"), quoting *Stirone* v. *United States*, 361 U.S. 212, 215 (1960); *United States* v. *Brown*, 959 F.2d 63, 67-68 (6th Cir. 1992) (tavern sold beer brewed in another State); *United*

The power Congress possesses under the Commerce Clause easily encompasses the activities of respondent's gold mine despite the Ninth Circuit's view that the gold mine was "a relatively small and entirely local operation." App., *infra*, 9a. This Court has held that Congress's power reaches the farmer who grows wheat and bakes his own bread, because even this wholly intrastate activity can affect interstate commerce. *Wickard* v. *Filburn*, 317 U.S. 111, 127-128 (1942). That power also reaches regulation of the price of intrastate milk sales, because those sales affect the price of interstate sales. *United States* v. *Wrightwood Dairy Co.*, 315 U.S. 110, 119-121 (1942). It reaches the local employment practices of employers whose goods later are shipped interstate. *United States* v. *Darby*, 312 U.S. 100 (1941). And it reaches the service of small family-owned restaurants and motels, because they may obtain food from out of state or serve interstate travelers. *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241, 252-258 (1964); *Katzenbach* v. *McClung*, 379 U.S. 294, 296-301 (1964). See also *Hodel* v. *Indiana*, 452 U.S. 314, 324 (1981) (commerce power allows Congress to protect "prime farmland" from damage); *Scarborough* v. *United States*, 431 U.S. 563, 575 (1977) (commerce power allows Congress to forbid felons to possess guns that have ever traveled interstate); *United States* v. *Sullivan*, 332 U.S. 689, 697-698 (1948) (commerce power allows Congress to

---

States v. *Butt*, 955 F.2d 77, 80 n.2 (1st Cir. 1992) (both RICO and the Hobbs Act reach extortion of protection money from prostitutes in Malden, Massachusetts); *United States* v. *Calder*, 641 F.2d 76, 78 (2d Cir.) (restaurant sold Canadian wine), cert. denied, 451 U.S. 912 (1981); *United States* v. *Gambino*, 566 F.2d 414, 418 (2d Cir. 1977) (private garbage collection in the Bronx), cert. denied, 435 U.S. 952 (1978).

prohibit relabeling of drugs after interstate shipment). In sum, "[i]f it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze." *United States* v. *Women's Sportswear Mfrs. Ass'n*, 336 U.S. 460, 464 (1949).

Under the constitutional standard, there was ample evidence that the activities of respondent's gold mine affected interstate commerce. The court of appeals conceded (App., *infra*, 4a, 9a-10a) that the mine purchased mining equipment and supplies, and hired employees, from outside the State. Respondent also purchased an airplane that he used to travel to and from Alaska, and he took the Cadillac that he had stolen from Silva from California to Alaska, where the car was used in the mine's work. *Id.* at 5a, 10a. Those activities are sufficient, by themselves, to establish the requisite effect on interstate commerce, because they contributed directly to the movement of goods and persons across state lines. See, *e.g.*, *Katzenbach* v. *McClung*, 379 U.S. at 300-301; *United States* v. *Muskovsky*, 863 F.2d at 1325; *United States* v. *Robinson*, 763 F.2d at 781.

The court of appeals also recognized (App., *infra*, 9a) that the gold mine produced a small but significant amount of gold for sale within Alaska; the mine's production, which indirectly affected the quantity of gold taken in and out of that State, was also sufficient to establish that the activities of the mine affected interstate commerce. See *Wickard* v. *Filburn*, 317 U.S. at 127-128; *United States* v. *Wrightwood Dairy Co.*, 315 U.S. at 120; *United States* v. *McManigal*, 708 F.2d 276, 283 (7th Cir.), vacated on other grounds, 464 U.S. 979 (1983).[5]

---

[5] The court of appeals also noted that respondent kept "a few nuggets" of the gold. App., *infra*, 9a. That gold, which

In addition, as the court of appeals noted (App., *infra*, 4a-5a), respondent mortgaged his Phoenix home (purchased with cash stolen from Silva) to finance the mining enterprise's expenses in Alaska. That transaction affected the market for real estate and credit in Arizona, and also had the effect of keeping the gold mine open in Alaska. See *Russell* v. *United States*, 471 U.S. at 862 (property "was * * * being used in an activity affecting commerce," because "the local rental of an apartment unit is merely an element of a much broader commercial market in rental properties"). Finally, the enterprise unquestionably used an instrumentality of interstate commerce—the telephone—to inform respondent of the progress of the operations, and it relied on instrumentalities of interstate commerce to receive monetary support from respondent. See *Scarborough* v. *United States*, 431 U.S. at 575 (sufficient for criminal conviction that the gun that the defendant possessed traveled in interstate commerce at some point in the past); *United States* v. *Doherty*, 867 F.2d at 68 ("slight" effect on interstate commerce required by RICO is satisfied by "placement of interstate telephone calls"), citing *United States* v. *Altomare*, 625 F.2d at 7-8. See also *United States* v. *McManigal*, 708 F.2d at 283. Even considered separately, any of the foregoing factors would be sufficient to meet the government's burden.

---

respondent took outside Alaska, was worth approximately $30,000. Tr. 774-784, 1723. The shipment of that gold outside of Alaska is additional persuasive evidence that the activities of the mine affected interstate commerce. Cf. *United States* v. *Darby*, 312 U.S. at 117-119 (local employment practices of employers affect interstate commerce because some of the goods produced were later shipped interstate).

Taken as a whole, the effect of the enterprise's activities on interstate commerce is unmistakable.

3. The Ninth Circuit's erroneous interpretation of RICO's interstate nexus requirement is sufficiently important to warrant correction by this Court. First, as we have already noted, the Ninth Circuit's decision conflicts with the view of every circuit that has considered what type of effect on interstate commerce is sufficient to satisfy RICO, and it cannot be reconciled with decisions of this Court interpreting the reach of Congress's power under the Commerce Clause. Reversal of the Ninth Circuit's decision is necessary to restore uniformity in the construction of an important Act of Congress.

Second, the Ninth Circuit's decision seriously disserves the goals that Congress intended to achieve in enacting RICO. As this Court has previously noted, RICO "was intended to provide new weapons of unprecedented scope for an assault upon organized crime and its economic roots." *Russello* v. *United States*, 464 U.S. 16, 26 (1983). Congress was particularly concerned about the infiltration of legitimate businesses by organized crime; that "point is made time and again during the debates and in the hearings before the House and Senate." *United States* v. *Turkette*, 452 U.S. 576, 591 (1981). The legislative history of RICO makes clear that many of the businesses that had been infiltrated by organized crime were, by their nature, purely local enterprises, such as bowling alleys, ballrooms, restaurants, and drugstores. See S. Rep. No. 617, 91st Cong., 1st Sess. 76-77 (1969). Indeed, Congress expressed special concern for the "small or marginal businessman who is most easily subject to invasion by organized crime." *Id.* at 77.

Congress could not have believed that the connection of those small businesses with interstate commerce would typically be more extensive than "[t]he purchase of 'equipment and supplies drawn generally from the stream of interstate commerce.'" App., *infra*, 9a-10a. Yet under the Ninth Circuit's view of the interstate nexus requirement, it is precisely those small and local business "enterprises" that can most easily be taken over by organized crime. Thus, under the view taken by the Ninth Circuit, "[w]hole areas of organized criminal activity would be placed beyond the reach of the enactment." *United States* v. *Turkette*, 452 U.S. at 589. A result so contrary to the goals that Congress intended to accomplish should not lightly be embraced. See, *e.g.*, *FTC* v. *Fred Meyer, Inc.*, 390 U.S. 341, 349 (1968).

Third, the Ninth Circuit's distinction between "minimal" effects on interstate commerce, which that court viewed as sufficient to satisfy the requirements of RICO, and "incidental" effects on commerce, which it viewed as insufficient, is completely elusive and incapable of principled administration. Because the interstate nexus requirement is an element of the crime, on which the jury must be instructed in every RICO case, arcane distinctions between "minimal" and "incidental" effects on commerce can only lead to jury confusion and arbitrary results.

Fourth, the Ninth Circuit's view that Alaska's geographical isolation, and its resulting dependence on interstate commerce for supplies and equipment, are reasons for finding that the activities of businesses in that State do *not* affect interstate commerce is logically perverse,[6] and it has grave implications for the federal

[6] No State of the Union is entirely self-sufficient. Indeed, this Court has recognized that it is the growth in the dimensions and complexity of our economy that makes it possible for Congress to regulate activities previously thought to be purely local. See *Summit Health, Ltd.* v. *Pinhas*, 500 U.S. 322, 328-329 (1991). The Ninth Circuit's decision turns that principle on its head. Under the Ninth Circuit's reasoning, the greater the dependence of a State on interstate commerce the lesser the federal government's power to reach and regulate commercial activity occurring in that State. No precedent of this Court supports such an anomalous doctrine.

government's ability to enforce scores of important federal statutes in Alaska and other isolated areas of the country, such as Hawaii, Guam, Puerto Rico, and the Virgin Islands. The reasoning used by the Ninth Circuit, if followed in other cases, could result in citizens and residents of such areas being deprived of the protection of civil rights, consumer protection, arson, and extortion laws, to name just a few of the federal statutes that depend for jurisdiction on proof of an effect on interstate commerce.[7] Accordingly, this Court's

[7] A small sample of the federal statutes that rely upon such proof for federal jurisdiction suffices to demonstrate the disruption that could be created by the court of appeals decision. See, *e.g.*, 7 U.S.C. 608b (Supp. V 1993) (Secretary of Agriculture can enter into marketing agreements where handling of agricultural commodities "affects[] interstate or foreign commerce"); 18 U.S.C. 844(i) (prohibiting the destruction by or explosion of "any building, vehicle, or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce"); 18 U.S.C. 1365(a) (prohibiting "tamper[ing] with any consumer product that affects interstate or foreign commerce"); 27 U.S.C. 213 (declaring "policy of Congress * * * to exercise the full reach of the Federal Government's constitutional powers in order to establish a comprehensive Federal program, in connection with the manufacture and sale of alcoholic beverages in or affecting interstate commerce"); 29 U.S.C. 151 (finding that "industrial strife * * * [has] the necessary effect of burdening or obstructing commerce"); 29 U.S.C. 630(b) (under the Age Dis-

review is necessary not only to bring consistency to the construction of RICO, but also to settle any doubts that the Ninth Circuit's analysis may raise about the proper construction of similar statutes in the United States Code.

CONCLUSION

The petition for a writ of certiorari should be granted. The Court may wish to consider summary reversal.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

JO ANN HARRIS
Assistant Attorney General

WILLIAM C. BRYSON
Deputy Solicitor General

MIGUEL A. ESTRADA
Assistant to the Solicitor General

AUGUST 1994

---

crimination in Employment Act, " 'employer' means a person engaged in an industry affecting commerce"); 42 U.S.C. 274e(a) ("It shall be unlawful for any person to knowingly acquire, receive, or otherwise transfer any human organ for valuable consideration for use in human transplantation if the transfer affects interstate commerce."); 42 U.S.C. 2000a(b) (prohibiting discrimination in places of public accommodation "if its operations affect commerce"); 49 U.S.C. App. 2001(3) (" 'transportation of hazardous liquids' means the movement of hazardous liquids by pipeline, or their storage incidental to such movement, in or affecting interstate or foreign commerce").

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Nos. 92-50395, 92-50460
D.C. No. 90-0925-01-LCN

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

JUAN PAUL ROBERTSON, DEFENDANT-APPELLANT

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

JUAN PAUL ROBERTSON, DEFENDANT-APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
Leland C. Nielsen, Senior District Judge, Presiding

[Filed Feb. 1, 1994]

Argued and Submitted
Oct. 5, 1993-Pasadena, California

Before: STEPHEN REINHARDT AND THOMAS G. NELSON, CIRCUIT JUDGES, AND FRANK A. KAUFMAN, DISTRICT JUDGE, *

Opinion by Judge Nelson;
Concurrence by Judge Reinhardt

T.G. NELSON, CIRCUIT JUDGE:

I

OVERVIEW

Juan Paul Robertson (Robertson) appeals his jury convictions for conspiracy and possession of cocaine with intent to distribute (Counts One through Four) and RICO (Count Six). Because we conclude that the Government failed to prove that the enterprise affected interstate commerce, we reverse the RICO count. We affirm the remaining Counts One through Four, but vacate the sentences with regard to those counts and remand for resentencing.

II

FACTS AND PROCEDURAL HISTORY

After working for several years as a lawyer for the Government, Robertson opened a private law practice

* Honorable Frank A. Kaufman, Senior United States Judge for the District of Maryland, sitting by designation.

in Los Angeles emphasizing criminal defense work for drug traffickers. In November, 1983, Julio Silva-Lopera (Silva) retained Robertson to defend him on a federal cocaine charge. Silva told Robertson that he had two kilos of cocaine and $980,000 concealed in the trunk of his Cadillac parked near his Reseda home. Silva asked Robertson to contact his wife and have the Cadillac placed in storage so that he could dispose of the contents when he was released from jail.

About one week later, Robertson showed up at his estranged wife's house in Phoenix driving the Cadillac. His then wife, Eddra McCarthy, saw a large amount of money and two kilos of cocaine in the trunk. Robertson told his wife to open a safe deposit box at a Phoenix bank and place the money there. He put the Cadillac in storage in Phoenix for a year. Robertson also instructed his wife to transfer the money in amounts less than $10,000 into different bank accounts in the Phoenix area. When Silva asked him about his Cadillac, Robertson told Silva that AAA had been unable to locate his car. Silva discharged Robertson. In February, 1984, Robertson stopped practicing law and moved to Arizona where he made several large cash purchases, including a house.

Walter Guarderas and his cousin Marco were drug traffickers and Robertson's former clients. In November, 1984, Walter and Marco received a thirty-kilogram shipment of cocaine from New York. Walter delivered twenty kilos of the cocaine to Marco at his house in Torrance, California. As Walter was leaving, he spotted a car he recognized as Robertson's parked outside Marco's house. Walter testified that he knew Marco was having difficulty getting paid for

the cocaine he had apparently sold on credit. Walter never saw Marco again.

In mid-January, 1985, Robertson arrived at his home in Phoenix with a suitcase full of cocaine and cash. Robertson poured cocaine on the kitchen table and Eddra poured the cocaine down the sink. Robertson then hit her, dragged her down the hallway to the bedroom and showed her the contents of the suitcase (cocaine and about $400,000). He then stated, "What do you think this is all about? This is going to make us a lot of goddamned money!"[1]

In January, 1985, Robertson moved in with a married couple in Phoenix where they witnessed Robertson handling hundreds of thousands of dollars and large quantities of cocaine. When Robertson learned that the husband was interested in gold mining in Alaska, Robertson agreed to finance a gold mining partnership in Alaska called Double Eagle Mining Co. After Robertson and the husband's son entered into a partnership agreement, the partnership purchased placer gold mining claims near Fairbanks ($125,000), mining equipment ($100,000), and travel expenses for seven employees. Robertson paid for nearly all of these expenses in cash. The partnership was soon dissolved but Robertson continued operating the mine through 1987 as Robertson Mining Co. In order to finance the mining operation for the 1986 season, Robertson applied for a

[1] This statement was the edited version presented to the jury. In fact, the statement included in the presentence report is as follows: "What do you think this is all about? I just killed Marco Guarderas! This is going to make us a lot of goddamned money!" Reference to the killing was ruled inadmissible as a confidential marital communication.

$300,000 loan using his Arizona home for collateral. Silva's Cadillac was driven to Alaska for use in the mining operation.

In 1980 or 1981 when he was in Los Angeles, Robertson had asked Dean Stephens to sell cocaine for him on a few occasions. After Stephens did so, he turned over the money to Robertson less his commission. Robertson continued to supply Stephens with cocaine to sell after Stephens moved to San Diego in 1984. This drug trafficking operation with Stephens continued through 1987.

In 1986, Robertson's former client, Rodriguez, and an immigration consultant, Maldonado, offered to supply Robertson with cocaine for resale. During October, 1986, and March, 1987, Robertson was involved in a series of drug transactions whereby Rodriguez, Maldonado, and Giron supplied cocaine to Robertson who then sold it to Stephens. Stephens then sold the cocaine to other dealers, including Elizabeth Grove and Cheryl Ledford.

The district court authorized a wiretap for Grove's telephone on January 9, 1987. Two weeks later she was arrested for possession of one kilogram of cocaine which was Robertson's. Robertson agreed with Dean Stephens that it would be in his best interests to represent Grove.

In May, 1987, Rodriguez told Robertson that Maldonado had been kidnapped by Peruvian cocaine traffickers who were demanding ransom for his release. Rodriguez and Robertson negotiated for Maldonado's release. The Peruvians released Maldonado after Rodriguez delivered five kilograms

of cocaine. Robertson told his new wife, Sue Canada, that he had negotiated the release of his client who had been kidnapped.

In June, 1987, after Maldonado received a large amount of cash from cocaine dealers, he gave Enrique Dulong a suitcase containing $420,000 of that cash and two ounces of cocaine for safekeeping. Maldonado was soon arrested and retained Robertson to defend him. Robertson contacted Dulong and asked him for $30,000 which Dulong gave him from the suitcase. Via a note given to Robertson, Maldonado authorized Dulong to release $250,000 to Robertson. Robertson told Maldonado that as soon as he was released on bail, he should flee and that the $250,000 would be used as a contingency fund to pay off the bail bond. Dulong released $200,000 to Robertson on August 12, 1987. When Maldonado was released on bail, he asked Robertson about the money and was told that it was in a trust account in Robertson's name and the name of the bail bondsman. Maldonado did not flee and told Robertson to return the money to Dulong, which he never did. Robertson only gave $25,000 to the bondsman and never returned the remaining amount to Maldonado or Dulong. The bondsman later returned the $25,000 to Robertson. Robertson instructed Sue Canada to place shoe boxes full of cash in a safe deposit box and then to deposit money in increments less than $10,000 into the bank at various times. The checking account was used beginning July 17, 1987, and Canada made the last deposit on November 2, 1987.

On October 17, 1991, a federal grand jury for the Southern District of California returned an eight-count superseding indictment against Robertson

charging him with conspiracy to possess cocaine with intent to distribute in violation of 21 U.S.C. §§ 841(a)(1), 846 (Count One); possession of cocaine with intent to distribute in violation of 21 U.S.C. § 841(a)(1) (Counts Two, Three & Four); use of a communication facility in furtherance of a narcotics felony in violation of 21 U.S.C. § 843(b) (Count Five); racketeering activity in violation of 18 U.S.C. § 1962(a) (Count Six); RICO forfeiture, 18 U.S.C. § 1963 (Count Seven); and continuing criminal enterprise (CCE) in violation of 21 U.S.C. § 848 (Count Eight). The jury found Robertson guilty as to Counts One through Four and Six and not guilty on Counts Five and Eight. The jury was undecided as to Count Seven and it was later dismissed.

Robertson was sentenced to twenty years imprisonment to run concurrently on all counts with five years of supervised release. The district court did not sentence Robertson pursuant to the Sentencing Guidelines. Both Robertson and the Government appeal.

III

DISCUSSION

A. RICO

Robertson argues that the Government failed to prove that the RICO enterprise affected interstate commerce. We agree. A violation of 18 U.S.C. § 1962(a)[2] requires proof of the following elements: (1)

---

[2] Section 1962(a) provides in pertinent part: It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity ... to use or invest, directly or indirectly, any part of such

a person receives income derived directly or indirectly from a pattern of racketeering activity; (2) that person uses or invests, directly or indirectly, any part or proceeds of such income in the acquisition of any interest in, or the establishment or operation of any enterprise; and (3) that enterprise is engaged in or its activities affect interstate or foreign commerce.

To constitute a RICO violation, the enterprise must be engaged in or affect interstate commerce. 18 U.S.C. § 1962(a). The Government must prove that the activities of the enterprise itself affect interstate commerce and not that each predicate act affects interstate commerce. *United States* v. *Bagnariol*, 665 F.2d 877, 892 (9th Cir.1981), *cert. denied sub nom. Walgren* v. *United States*, 456 U.S. 962, 102 S.Ct. 2040, 72 L.Ed.2d 487 (1982); *see also United States* v. *Rone*, 598 F.2d 564, 573 (9th Cir.1979), *cert. denied sub nom. Little* v. *United States*, 445 U.S. 946, 100 S.Ct. 1345, 63 L.Ed.2d 780 (1980). However, in determining whether the interstate commerce nexus results from the enterprise, "[i]t is permissible to find that nexus from acts also charged as predicate acts *when those constitute the activities of the enterprise.*" *Bagnariol*, 665 F.2d at 893 (emphasis added). "A minimal effect on interstate commerce satisfies this jurisdictional element." *Id.* at 892. Because the mining venture was separate from the criminal activity, the predicate acts are not considered in the interstate commerce analysis.

---

income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. 18 U.S.C. § 1962(a).

In *Musick* v. *Burke*, 913 F.2d 1390 (9th Cir.1990), we held that the interstate nexus requirement is not satisfied "where local activities have incidental effects on interstate commerce." *Id.* at 1398. Similarly, in this case, the Government failed to establish that the RICO enterprise had anything more than an incidental effect on interstate commerce. There was no evidence introduced to show that the activities of the enterprise itself affected interstate commerce. The Government argues that the interstate commerce requirement was satisfied by proof that Robertson invested large amounts of money in the Alaska gold mine which was derived from the Arizona and California racketeering acts. However, apart from those predicate acts, there was no evidence to show that the activities of the mine, or the profits obtained therefrom, affected interstate commerce. The evidence at trial established that, with the exception of a few nuggets which Robertson kept, none of the gold obtained from the mine was sold outside Alaska. The mine was a relatively small and entirely local operation, only producing approximately $200,000 in gold. The Government failed to prove an effect on interstate commerce by showing, for example, that the money produced by the gold mine funded the illegal predicate acts.

During oral argument, the Government also contended that it proved the requisite interstate commerce nexus with evidence that Robertson had purchased supplies and equipment and had hired employees outside Alaska. In *Musick*, however, we rejected a similar argument when we held that RICO jurisdiction can be no less than that required under the Sherman Act. *Musick*, 913 F.2d at 1398. The purchase of "equipment and supplies drawn generally

from the stream of interstate commerce" is insufficient to establish the interstate nexus required under RICO. *Id.* at 1397. Given that Alaska is fairly isolated, most supplies must be shipped there via interstate commerce. Carried to its logical conclusion, the Government's argument would require us to find that any local Alaskan operation has an effect on interstate commerce merely because supplies, equipment and employees are shipped there. We decline to do so.

For the same reason, we reject the Government's arguments that Robertson's use of an airplane to fly from Arizona to Alaska and his use of the Cadillac in connection with the mine were sufficient to establish the requisite impact on interstate commerce. These activities had, at most, only an incidental effect on interstate commerce. Therefore, absent proof that the RICO enterprise itself had more than an incidental effect on interstate commerce, we reverse the RICO conviction.

B. Prejudicial Effect of Predicate Acts

Robertson contends that racketeering acts 6 and 7 were so prejudicial as to contaminate the entire trial and therefore, he argues, the remaining counts should be reversed. We reject this contention. Predicate acts 6 and 7 pertained to Robertson's stealing money and property from Silva and Guarderas. The district court issued an instruction requiring the jury to consider each count separately. It also instructed the jury that their verdict on one count should not control on any other count. The jury is presumed to have followed the instructions and not to have confused the evidence pertinent to

separate counts. *See United States* v. *Parker*, 432 F.2d 1251, 1255 (9th Cir.1970), *cert. denied*, 404 U.S. 836, 92 S.Ct. 121, 30 L.Ed.2d 67 (1971). Therefore, we conclude that because the jury was to consider each count separately, Robertson was not prejudiced by evidence establishing a separate count. Moreover, the fact that the Government failed to establish the RICO count does not mean that it exceeded its wide discretion in deciding what charges to bring.[3]

C. Evidentiary Issues

Robertson next contends that the district court erred in admitting several items of evidence. The challenged evidence can be characterized as prior bad act evidence, with the exception of the drug ledger evidence.

The district court's construction of Fed.R.Evid. 404(b) is a question of law reviewed *de novo*. *United States* v. *Bibo-Rodriguez*, 922 F.2d 1398, 1400 (9th Cir.), *cert. denied*, — U.S. ——, 111 S.Ct. 2861, 115 L.Ed.2d 1028 (1991). This court reviews for abuse of discretion the district court's decision to admit prior bad act evidence under Fed.R.Evid. 404(b). *United*

---

[3] Robertson raises several other issues with regard to the RICO conviction. He contends that the district court erred in: (1) denying his request for a special verdict on the RICO count; (2) refusing to dismiss the RICO count for lack of venue; (3) denying his motion to sever the RICO and CCE counts; (4) excluding Agent Devetko's testimony relating to the RICO charge; and, (5) denying CJA funds to locate a defense witness who was allegedly the owner of the stolen Cadillac which served as a predicate act (racketeering act six). He also claims that the RICO statute is unconstitutionally vague. Because we reverse the RICO count on interstate commerce grounds, we need not address these contentions.

States v. *Hegwood*, 977 F.2d 492, 496 (9th Cir.1992), *cert. denied sub nom. Wilson* v. *United States*, — U.S. ——, 113 S.Ct. 2348, 124 L.Ed.2d 257 (1993). Similarly, the district court's decisions regarding relevance and prejudice are reviewed for abuse of discretion. *United States* v. *Daly*, 974 F.2d 1215, 1216-17 (9th Cir.1992).

Prior bad act evidence can only be admitted under Fed.R.Evid. 404(b)[4] if that evidence: (1) tends to prove a material point; (2) is not too remote in time; (3) is based upon sufficient evidence; and, (4) in some cases, is similar to the offense charged. *Bibo-Rodriguez*, 922 F.2d at 1400; see also United States v. Houser, 929 F.2d 1369, 1373 (9th Cir.1991). Finally, even if the evidence satisfies those four prerequisites, it may be excluded under Rule 403 if its probative value is substantially outweighed by the danger of unfair prejudice. *Bibo-Rodriguez*, 922 F.2d at 1400-01.

1. Disappearance of Marco Guarderas

The Government introduced evidence that Robertson purchased twenty kilos of cocaine from Marco and that Marco was unable to obtain payment for the cocaine. Walter Guarderas, Marco's cousin, testified that he was aware of Marco's unsuccessful efforts to collect from Robertson. He also testified that he had seen a car similar to Robertson's parked

---

[4] Fed.R.Evid. 404(b) states: Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. . . .

at Marco's house and that he never saw Marco again. We conclude that it was error to admit evidence of Marco's disappearance. Such evidence was inadmissible under Rule 404(b) because it did not tend to prove a material element of any of the charged offenses.

Although we conclude that it was error to admit such testimony, we need not reverse the drug convictions if we find that the error was harmless. *United States* v. *Brown*, 880 F.2d 1012, 1016 (9th Cir.1989). "[A]n erroneous admission of evidence is harmless if it is more probable than not that its admission did not affect the jury's verdict." *United States* v. *Harrison-Philpot*, 978 F.2d 1520, 1527 (9th Cir.1992), *cert. denied*, — U.S. ——, 113 S.Ct. 2392, 124 L.Ed.2d 294 (1993). We find that the error was harmless. The Government did not argue in closing that Marco's disappearance was the result of foul play attributed to Robertson. *Cf. Brown*, 880 F.2d at 1016 (error to admit prior bad act evidence not harmless where there were continued references to prior bad acts in closing argument). Nor did the jury hear Robertson's statement that he killed Marco. Given the limited reference to the incident over the course of the fourteen-day trial, we find that a rational jury would not have drawn the inference that Robertson killed Marco.

Furthermore, the evidence at trial overwhelmingly established Robertson's guilt on the drug charges. The jury heard evidence from several Government witnesses that Robertson was trafficking cocaine as charged in the indictment. Maldonado testified that he supplied cocaine to Robertson. Sandy and Dean Stephens testified that they obtained cocaine from

Robertson to sell. No evidence was admitted to connect Robertson to the murder and there was no argument on the Government's part linking Robertson to Marco's murder. Therefore, we are convinced that the error was harmless in light of both the overall strength of evidence against Robertson on the drug counts and the minimal reference to Marco's disappearance which occurred during a lengthy trial.[5]

2. Drug Use

Similarly, there is no need to decide whether the admission of evidence of Robertson's drug use was error, since we are convinced that any such error was harmless. As described above, there is overwhelming direct evidence to support his convictions, including the testimony of witnesses who recounted

---

[5] We note that Robertson did not make a contemporaneous objection to the testimony regarding Marco's disappearance. Prior to its admission, however, the Government made an offer of proof as to the content of Walter Guarderas' testimony and at that time Robertson objected on relevance grounds. The Government has not argued that Robertson waived this objection and that our review should be under the plain error standard. Nor do we conclude that our review should be for plain error. Robertson raised his relevance objection immediately preceding Walter's testimony and it arguably covers the issue raised here.

numerous occasions when he possessed and distributed large quantities of cocaine.[6]

3. Drug Possession

The Government introduced evidence that Robertson had possessed varying quantities of drugs from 1983 through 1987. Robertson contends that the testimony of several witnesses who observed Robertson in possession of cocaine was irrelevant. We disagree. Where large quantities of drugs are involved, "[w]e have consistently held that evidence of a defendant's prior possession or sale of narcotics is relevant under Rule 404(b) to issues of intent, knowledge, motive, opportunity, and absence of mistake or accident in prosecutions for possession of, importation of, and intent to distribute narcotics." *United States* v. *Mehrmanesh*, 689 F.2d 822, 832 (9th Cir.1982).

Robertson denied possessing drugs for distribution purposes. He also denied ever possessing more than an ounce of cocaine. The jury was properly entitled to draw the inference that because Robertson possessed large quantities of drugs, he intended more than personal use. *See id.* Therefore, evidence of Robertson's prior drug possession was relevant and admissible to establish his intent to distribute, an

---

[6] Evidence of prior drug use is ordinarily not relevant under Rule 404(b) to prove conspiracy and possession with intent to distribute narcotics. *See United States* v. *Hill*, 953 F.2d 452, 456-58 (9th Cir.1991); *see also United States* v. *Mehrmanesh*, 689 F.2d 822, 831-32 (9th Cir.1982). An exception to this rule covers certain narrow circumstances (*see Hegwood*, 977 F.2d at 497), but we find no need to decide if it applies here.

element the Government was required to prove on the offenses charged in Counts One through Four.

4. Maldonado/Dulong Theft

The evidence at trial indicated that Robertson stole approximately $200,000 and two ounces of cocaine from Maldonado which Maldonado had placed with Dulong for safekeeping. Sue Canada testified that she maintained a joint checking account with Robertson in which only this drug money was deposited in amounts less than $10,000. She testified that none of the money which Robertson may have earned in legal fees in 1987 (the year when the money was stolen) was deposited into this account. This evidence was relevant to establish an element of the RICO charge (the money laundering predicate act), and was therefore properly admissible.

5. Forgery

Robertson's tax attorney, Connell, testified that his signature was forged on Robertson's loan documents. During cross-examination Robertson admitted to forging Connell's signature on those documents. The Government argues that the forged loan documents were relevant to establish that Robertson had little legitimate income during the period he was involved in illegal drug activity (1984-1987); that his only income was from illegal drug activity; and that he was therefore forced to mask his illegal income when he applied for a loan. We agree.[7]

[7] The Government argues that we should review this issue under the plain error doctrine because Robertson failed to object. We decline to do so because Robertson objected immediately preceding Connell's testimony on several grounds,

The evidence was admissible to establish an element of the RICO charge. The evidence indicated that after Robertson purchased a home in Arizona with money he had stolen from Silva in California, he applied for a loan to finance the mining operation in Alaska and used the Arizona home as collateral for the loan. The loan documents were relevant to establish the connection between the stolen property and the RICO enterprise. The false statements and forgeries contained in the loan documents were similarly relevant in showing that Robertson was masking illegal income and that the illegal income was used to invest in the mine. Such proof was necessary to establish one of the predicate acts, interstate transportation of stolen property and the investment of that illegally obtained money into the RICO enterprise.

6. False Loan Applications & Filing False Tax Returns

At the time of the trial, Robertson was facing prosecution for making false statements and tax evasion in Arizona. Robertson argues that the district court should have sustained his objection on Fifth Amendment grounds. We disagree that the admission of the evidence violated Robertson's right against self-incrimination. "A defendant who testifies at trial waives his Fifth Amendment privilege and may be cross-examined on matters made relevant by his direct testimony .... The scope of the defendant's waiver is coextensive with the scope of

including relevance and undue prejudice. Therefore, we do not find that Robertson waived his objection.

the relevant cross-examination." *United States* v. *Black*, 767 F.2d 1334, 1341 (9th Cir.) (citations omitted), *cert. denied*, 474 U.S. 1022, 106 S.Ct. 574, 88 L.Ed.2d 557 (1985). On cross-examination, the Government may ask questions which are "'reasonably related' to the subjects covered by the defendant's testimony." *United States* v. *Hearst*, 563 F.2d 1331, 1340 (9th Cir.1977), *cert. denied*, 435 U.S. 1000, 98 S.Ct. 1656, 56 L.Ed.2d 90 (1978).

During direct examination, Robertson testified that he had refinanced his house for $300,000. The Government was properly permitted to cross-examine him about this transaction in an attempt to elicit the fact that the loan applications were false and that the money obtained was invested in the mine. Robertson also testified that the money he had invested in the Alaska gold mine was not obtained from illegal activity. He testified on direct that the only illegal activity he had engaged in was tax evasion, but that the money was obtained legally from his practice of law. The Government was properly permitted to cross-examine Robertson regarding the filing of the false tax returns, activity which he admitted on direct. Cross-examination on both of these matters was reasonably related to his direct testimony. Consequently, the district court did not err in overruling Robertson's objection on self-incrimination grounds.[8]

[8] Robertson also argues that the evidence was irrelevant and inadmissible under Rule 404(b). We reject this argument. The evidence was admissible for the same reasons we stated in III.C.5., *supra*.

7. Spousal Violence

Robertson contends that the district court erred in admitting Eddra McCarthy's testimony that after she had poured cocaine down the sink, Robertson dragged her by her hair into the bedroom. He argues that such evidence of spousal violence was a violation of Rule 404(b) and, in any event, was unduly prejudicial. McCarthy also testified that Robertson had stated: "What do you think this is all about? This is going to make us a lot of goddamned money!" We conclude that this testimony was relevant to establish not only Robertson's drug dealing activity but his state of mind. *See* Fed.R.Evid. 404(b). Robertson's violent reaction to her destruction of the cocaine tended to establish the scope of his drug dealing involvement as well as its importance to him. A person in possession of cocaine for personal use would be unlikely to have responded in the way Robertson did, either physically or verbally. The district court did not abuse its discretion in ruling that the probative value of this evidence outweighed any prejudicial effect.

8. Drug Ledger

Robertson argues that the admission of a drug ledger was irrelevant and prejudicial. The drug ledger was admitted with the testimony of an expert who testified that the ledger evidenced drug transactions. Robertson admitted during cross-examination that the ledger was his; however, he denied that the majority of the entries pertained to drugs. The jury was free to disregard Robertson's explanation that the majority of the ledger entries related to gold transactions. Admission of the drug ledger was relevant to establish Robertson's con-

nection to the drug trafficking charges in the indictment and we conclude the district court did not err in admitting it.

Finally, Robertson argues that prior to admission of all Rule 404(b) evidence, the district court failed to balance the probative value of the evidence with its prejudicial impact. However, to the extent Robertson's argument relies upon a requirement for recital of the Rule 403 test, it lacks merit. "The district court need not recite the Rule 403 test when balancing the probative value of evidence against its potential for unfair prejudice." *Daly*, 974 F.2d at 1217; see also *United States* v. *Johnson*, 820 F.2d 1065, 1069 (9th Cir.1987) (upheld admission of Rule 404(b) evidence, finding that district court implicitly engaged in Rule 403 balancing of probative value against prejudicial effect). Because Robertson argued before the district court that admission of the prior bad act evidence would be unduly prejudicial, we find that the district court implicitly engaged in the requisite balancing, even though it did not explicitly state that it was doing so on the record. *See Johnson*, 820 F.2d at 1069. However, we again emphasize the importance of explicit rulings as this facilitates appellate review and ensures that the parties' objections are addressed on the record. See *id.* at 1069 n. 2.

Accordingly, after carefully reviewing the entire trial transcript, we are convinced that it is more probable than not that the erroneous admission of

Marco's disappearance did not affect the jury's verdict.[9]

D. Motions for Continuance

Robertson next argues that the district court erred in denying his motions for continuance. The district court's decision to deny a motion for continuance is reviewed for abuse of discretion. *United States* v. *Tham*, 960 F.2d 1391, 1396 (9th Cir. 1992). We do not find an abuse of discretion unless the denial is arbitrary and unreasonable given the following four factors: "(1) the extent of the defendant's diligence in readying the defense; (2) the likelihood that the continuance would have satisfied the defendant's need; (3) the inconvenience to the court, opposing party, and witnesses; and (4) the extent to which the defendant may have been harmed." *Id.* In order to constitute reversible error, "the defendant must show that the denial resulted in actual prejudice to his defense." *Id.*

The district court granted Robertson two continuances—first from September 17, 1991, to November 19, 1991, and then to January 22, 1992. It denied Robertson's third motion for continuance which came on January 21, 1992, the day before trial was to commence. Robertson argues that he did not have time to prepare for trial because the Government failed to release Jencks Act materials three days prior to the testimony of the witness pursuant to the district court's order.

---

[9] Because we find only one evidentiary error, we need not reach Robertson's argument regarding the cumulative effect of Rule 404(b) errors.

"*After* a prosecution witness testifies, the Jencks Act requires that the government produce any 'statements' made by a witness in its possession that relate to the subject matter of the trial testimony." *United States* v. *Kerr*, 981 F.2d 1050, 1052 (9th Cir. 1992) (emphasis added). Although the Jencks Act does not require disclosure prior to witness testimony, the district court ordered the Government to provide the Jencks Act materials three days in advance of each witness's testimony. Robertson contends that the Government repeatedly failed to provide those materials three days in advance.

Robertson has failed to demonstrate that the denial of a continuance resulted in actual prejudice to his defense. *See Tham*, 960 F.2d at 1396. Indeed, in the example Robertson cites in which the Government was late in providing materials, the district court granted him a one-half day recess to prepare. He does not explain specifically how the Government's tardiness resulted in actual prejudice to his case. Therefore, the district court did not abuse its discretion in denying his third motion for continuance the day before trial.

E. Bill of Particulars

Robertson next claims that the district court erred in denying his motion for a bill of particulars. A bill of particulars was not necessary in this case because the indictment apprised Robertson of the specific charges against him, thereby minimizing the danger of surprise at trial; aided him in preparing for trial; and protected him against double jeopardy. *See United States* v. *Long*, 706 F.2d 1044, 1054 (9th Cir.

1983). The indictment contained the names of alleged coconspirators, the approximate dates on which the alleged illegal conduct occurred, and the overt acts that comprised the illegal activity. *See United States* v. *DiCesare*, 765 F.2d 890, 897-98 (9th Cir.) (bill of particulars not warranted when defendant seeks to obtain coconspirator names, exact dates and overt acts), *amended on other grounds*, 777 F.2d 543 (1985).

Moreover, Robertson "fails to demonstrate surprise, prejudice, or an increased risk of double jeopardy stemming from the alleged shortcomings of the indictment." *United States* v. *Burt*, 765 F.2d 1364, 1367 (9th Cir.1985). His conclusory statements to that effect are insufficient to establish prejudice. *See id*. The indictment apprised Robertson of the charges against him and enabled him to prepare an adequate defense. *See DiCesare*, 765 F.2d at 897. Nothing more is required. Therefore, the district court did not abuse its discretion in denying Robertson's motion for a bill of particulars. *See Long*, 706 F.2d at 1054.

F. Wiretap Evidence

Robertson claims that the district court erred in refusing to suppress wiretap evidence obtained from the residences of Elizabeth Grove and Dean Stephens. Our review of the district court's determinations under the wiretap statute (18 U.S.C. § 2518) is deferential. *United States* v. *Brown*, 761 F.2d 1272, 1275 (9th Cir.1985). Review is *de novo* as to whether there was a "full and complete statement," but we review the district court's conclusion as to necessity for an abuse of discretion. *Id.*

Authorization of a wiretap requires two findings: (1) probable cause to believe that "an individual is committing, has committed, or is about to commit certain offenses including narcotics violations, that relevant communications will be intercepted by the wiretap, and that targeted persons will use the targeted facility," *id.* (internal quotations and citations omitted); 18 U.S.C. § 2518(3)(a); and (2) "normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous." *Brown*, 761 F.2d at 1275; 18 U.S.C. § 2518(3)(c). Finally, the applicant seeking the wiretap must provide the judge with "a full and complete statement" establishing the necessity requirement. 18 U.S.C. § 2518(1)(c).

The factual statements contained in the wiretap affidavits establish probable cause to believe that Elizabeth Grove and Dean Stephens were engaged in drug trafficking. The affidavits also contain full and complete statements demonstrating the necessity requirement. For example, they explain that the agents had been unable to obtain the cooperation of coconspirators and that further undercover operations in the form of fronting funds would be high-risk as it could result in rip-offs. The affidavits also state that physical surveillance of Grove while operating her vehicle proved unsuccessful and that the use of a stationary surveillance camera at Grove's residence was similarly unsuccessful. The affidavits also explain why other investigative techniques reasonably appear unlikely to succeed, *e.g.*, vehicle tracking devices and search warrants. The affidavits contain sufficient factual support, Robertson's arguments to the contrary notwithstanding.

G. Presentence Report

Finally, Robertson contends that the district court erred in failing to comply with Fed.R.Crim.P. 32 by refusing to correct the presentence report (PSR) which contained Robertson's statement to his wife that he had killed Marco Guarderas.

> Fed.R.Crim.P. 32(c)(3)(D) provides: If the comments of the defendant and the defendant's counsel or testimony or other information introduced by them allege any factual inaccuracy in the presentence investigation report or the summary of the report or part thereof, the court shall, as to each matter controverted, make (i) a finding as to the allegation, or (ii) a determination that no such finding is necessary because the matter controverted will not be taken into account in sentencing. A written record of such findings and determinations shall be appended to and accompany any copy of the presentence investigation report thereafter made available to the Bureau of Prisons.

We require strict compliance with Rule 32. *United States* v. *Fernandez-Angulo*, 897 F.2d 1514, 1516 (9th Cir.1990). If the district court fails to comply with Rule 32 when a defendant challenges the factual accuracy of matters contained in the PSR, we must vacate the sentence and remand for resentencing. *Id.*

In this case, Robertson challenged the statement he had made to his wife regarding the murder of Marco Guarderas. He denied ever having made that statement and moved that it be stricken from the PSR. The district court denied that motion, stating only that the fact that the statement was

inadmissible at trial did not require that it be stricken from the PSR. The district court failed to comply with either requirement under Rule 32. It did not make an explicit finding as to the accuracy of the statement. Nor did it unambiguously and expressly state that it would not take the controverted matter into consideration when imposing the sentence. See *id.* at 1516 n. 2. If the district court states that the controverted matters will not be considered in imposing sentence, the sentencing record must unambiguously reflect that the district court placed no reliance on the controverted matters. If the record is ambiguous in this regard, the sentence must be vacated and remanded for resentencing. *Id.* The district court did not state that it would not consider the controverted statement. Therefore, we vacate the four drug conviction sentences (Counts One through Four) and remand for resentencing.[10]

H. Sentencing

The Government appeals Robertson's sentence contending that the district court erred in failing to sentence Robertson pursuant to the Sentencing Guidelines because one of the predicate acts (structuring deposits in violation of 18 U.S.C. § 1956(a)(3)) occurred after the enactment date of the Guidelines. *See United States* v. *Kohl*, 972 F.2d 294, 297-98 (9th Cir. 1992) (where there is a continuing offense (drug conspiracy) which begins prior to the Guidelines' effective date (November 1, 1987) and

---

[10] We also note that it is insufficient if, on remand, the district court states that it did not rely upon the disputed material when imposing the sentences. Rather, resentencing is required after strict compliance with Rule 32. *See Fernandez-Angulo*, 897 F.2d at 1516.

continues after that date, the Guidelines apply). However, we need not reach this issue because the Government's straddle argument is based only upon racketeering conduct occurring after the effective Guideline date. Because we reverse the RICO conviction, the Guidelines clearly do not apply. The drug convictions which we affirm involve conduct that occurred prior to the effective date of the Guidelines.

CONCLUSION

Because the Government failed to prove that the RICO enterprise affected interstate commerce, we REVERSE the RICO conviction. We AFFIRM the drug convictions on Counts One through Four, but because the district court did not comply with Fed.R.Crim.P. 32, we VACATE the drug conviction sentences and REMAND for resentencing.

REINHARDT, Circuit Judge, concurring specially:

I fully concur in Judge T.G. Nelson's opinion for the court. I write separately, however, in order to express my concern over two aspects of the prosecution's conduct: first, overcharging, second, the improper introduction into evidence of unrelated bad acts. These practices unfortunately appear all too frequently in prosecutions these days.

The defendant in this case was deeply involved in the illegal drug trade. He also owned an unprofitable but legal gold mine. Rather than simply prosecuting the defendant on the basis of the overwhelming evidence of his illicit drug activity, the prosecutors—perhaps because of RICO's severe imprisonment and forfeiture provisions,[1] perhaps because the use of that statute permits the prosecution to introduce evidence of criminal acts that would otherwise be barred[2]—

[1] Enhanced sanctions available under RICO include 20 years imprisonment, a $25,000 fine, or both, and forfeiture of ill-gotten gains and of any interest in an enterprise that was used to violate the statute. 18 U.S.C. § 1963. As one commentator noted, "the disparity of scale between the RICO sanctions and those of some of its predicate actions suggests that the prosecutor's ability unilaterally to declare a crime major or minor has been dramatically increased." Lynch, *RICO: The Crime of Being a Criminal* (pt. II), 87 Colum.L.Rev. 661, 723 (1987).

[2] RICO's predicate act requirement is satisfied if the prosecution shows at least two acts of racketeering activity occurring within ten years of each other, 18 U.S.C. § 1961(5), so that evidence of crimes that would otherwise be barred by the statute of limitations may be admissible. Thus, in this case, prosecutors were able to offer evidence of crimes occurring in 1983 and 1985, which were not independently charged but were relevant only as RICO predicate offenses. Although the district judge specifically instructed the jury not to allow

decided to turn the defendant's ownership of a gold mine into the centerpiece of his prosecution. Notwithstanding the gold mine's tenuous nexus with interstate commerce, Robertson was charged with investing income derived from a pattern of racketeering activity in an "enterprise ... engaged in, or the activities of which affect interstate or foreign commerce," in violation of the RICO statute. In doing so, the prosecution immeasurably complicated the trial and substantially increased the burden on the defendant.

The practice of overcharging a defendant[3] involves an abuse of the prosecutor's generally unreviewable

evidence relevant to one count to taint its consideration of the other charges, the admission of such evidence is, at the very least, an added worry for the defense.

In other cases, the addition of an overarching RICO charge may allow prosecutors to join disparate offenses in a single trial, where joinder might otherwise be deemed unduly prejudicial. *See* Lynch, *supra* note 1 (pt. III), at 927-28 (noting that "[t]his motivation for use of RICO is especially strong where the offenses sought to be joined are very serious and prejudicial, and thus particularly likely to be severed").

[3] Justice Blackmun has described prosecutorial overcharging as when prosecutors bring "charges more serious than they think appropriate for the ultimate disposition of a case." *Bordenkircher* v. *Hayes*, 434 U.S. 357, 368 n. 2, 98 S.Ct. 663, 670 n. 2, 54 L.Ed.2d 604 (1978) (Blackmun, J., dissenting). Similarly, the commentary to the ABA Standards Relating to the Function of the Prosecutor notes that:

> [a]lthough it is difficult to give a definition of "overcharging," the heart of the criticism is the belief that prosecutors bring charges not in the good faith belief that they are appropriate under the circumstances and with an intention of prosecuting them to a conclusion, but merely as a harassing and coercive device in the expectation that they will induce the defendant to plead guilty.

discretion. Of necessity, courts are reduced to expressing concern over the practice and their inability to do anything about it. *See, e.g., Bordenkircher*, 434 U.S. at 368 n. 2, 98 S.Ct. at 670 n. 2 (Blackmun, J., dissenting); *United States* v. *Andrews*, 612 F.2d 235, 241-42 n. 7 (6th Cir. 1979), *reh'g en banc*, 633 F.2d 449 (1980), *cert. denied sub nom. Brooks* v. *United States*, 450 U.S. 927, 101 S.Ct. 1382, 67 L.Ed.2d 358 (1981); *Andrews*, 612 F.2d at 256 n. 23 (Keith, J., dissenting).[4] The result is that "overcharging ...

Id. § 3-3.10 commentary at 3.59. As such, prosecutorial overcharging includes but is not limited to bringing charges unsupported by probable cause.

[4] Practical problems of proof, bolstered by prudential and arguably constitutional concerns, have led the judiciary effectively to tolerate the practice. As Justice Blackmun pointed out in *Bordenkircher*, prosecutorial overcharging is difficult or even impossible to prove. *See* 434 U.S. at 368 n. 2, 98 S.Ct. at 670 n. 2 (Blackmun, J., dissenting). If the defendant is acquitted of a charge, the original charging decision escapes appellate review. In other circumstances, the rule of deference to the prosecutor is so firmly established that judicial review of the prosecutor's charging decisions is, in effect, an empty exercise. *See, e.g., Wayte* v. *United States*, 470 U.S. 598, 105 S.Ct. 1524, 84 L.Ed.2d 547 (1985) (explaining that prosecutor's "broad discretion rests largely on the recognition that the decision to prosecute is particularly ill-suited to judicial review"). A recent decision of this court, decided on review of a plea bargain, particularly illustrates the judicial reluctance to interfere in matters involving the prosecutor's charging discretion and suggests its constitutional underpinnings. In *United States* v. *Redondo-Lemos*, 955 F.2d 1296 (9th Cir.1992), the court rejected a defendant's constitutional challenge to the prosecutor's charging decision and refused to evaluate whether the prosecutor's discretion had been exercised in an arbitrary and capricious manner. The court reasoned that charging decisions "involve exercises of judgment and discretion that are often difficult to articulate in a manner suitable for judicial evaluation," and that, furthermore, serious separation of powers questions would be raised by judicial supervision of prosecutorial charging discretion. *Id.* at 1299-1301. The court did, however, distinguish the requirement of probable cause for prosecution, for which, as past cases establish, judicial scrutiny is appropriate. *Id.* at 1300 n. 5.; *see also United States* v. *Sanchez*, 908 F.2d 1443, 1445 (9th Cir.1990).

continue[s] to occur regularly, without meaningful judicial review or correction." Gershman, *The New Prosecutors*, 53 U.Pitt.L.Rev. 393, 408 (1992); *see generally* A. Goldstein, The Passive Judiciary: Prosecutorial Discretion and the Guilty Plea (1981).

While it is impossible to gauge precisely how often overcharging occurs, it is easy to understand some of the reasons why it occurs. Plea bargaining is now the mainstay of our criminal law system, and excessive charges give the prosecutor added leverage in the plea bargaining process. Because of the threat of prosecution on such charges, defendants may be induced to plead guilty on more unfavorable terms than might otherwise be fair or reasonable. The risk of going to trial may simply become too great, even in cases in which the defendant may arguably be innocent of some of the charges. Moreover, beyond the plea bargaining stage, overcharging may facilitate a compromise verdict in which the jury channels its doubt as to the defendant's guilt into acquitting him on some charges but not others. Thus, while a defendant who chooses not to proffer a guilty plea may successfully resist prosecutorial overcharging by winning a judgment of acquittal, or, as in this case, having his conviction overturned on appeal, these possibilities hardly amount to adequate protection against the practice. Primarily, defen-

dants must rely for fair treatment on the prosecution's responsible use of its discretion.

The RICO statute seems particularly susceptible to prosecutorial abuse, given that its scope is broad and somewhat ill-defined, and its penalties are severe. Although the Second Circuit has led the way in attacking misuse of RICO, this circuit too has acknowledged the problem. *See, e.g., United States* v. *Malizia*, 720 F.2d 744, 745 (2d Cir. 1983); *United States* v. *Ivic*, 700 F.2d 51, 64-65 (2d Cir. 1983); *United States* v. *Thordarson*, 646 F.2d 1323, 1329 n. 10 (9th Cir.), *cert. denied*, 454 U.S. 1055, 102 S.Ct. 601, 70 L.Ed.2d 591 (1981); *United States* v. *Huber*, 603 F.2d 387, 395-96 (2d Cir.1979), *cert. denied*, 445 U.S. 927, 100 S.Ct. 1312, 63 L.Ed.2d 759 (1980). At any rate, the fact of overzealous prosecutions under RICO at this late date is even less justifiable than with these earlier cases. With a growing body of case law to delineate the statute's scope, it is reasonable to expect greater prosecutorial restraint in its application.

Besides overcharging, there is another respect in which the prosecution in this case strayed dangerously close to the line separating a fair conviction from an unfair one. Not content to rely on the overwhelming legitimate evidence of Robertson's drug trafficking, the prosecution submitted evidence implicating Robertson in murder, spousal abuse and drug use.[5] As Justice Jackson explained in *Michelson*

[5] Given the liberal abuse of discretion standard applicable to the evidentiary decisions of the district court, and the facts of in this particular case, we do not hold that the admission of evidence of spousal abuse was error. Our failure to reverse on this issue, however, should not be interpreted as tacit approval

v. *United States*, 335 U.S. 469, 476, 69 S.Ct. 213, 218, 93 L.Ed. 168 (1948), a jury presented with evidence of such "bad acts" is liable "to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge." Faced with a defendant who they suspect is a murderer, wife-batterer and drug addict, jurors might well believe they are letting him off easy by convicting him for the crimes charged in the indictment.

Accordingly, the Federal Rules of Evidence declare as a general principle that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." Fed.R.Evid. 404(b). As a subset of the larger rule that evidence of bad character is not ordinarily admissible to support an inference of bad conduct, the rule barring bad act evidence possesses "almost constitutional proportions."[6] It helps preserve one of the most fundamental precepts of our system of criminal law: the requirement that criminal punishment be based on the commission of specific prohibited acts, not on the defendant's perceived bad character or tendency to commit crime.[7]

of the admission of such evidence generally. Instead, it should be emphasized that the admission of evidence of spousal abuse will often be error. Recent, entirely commendable, public awareness of the wrongfulness of spousal abuse means that evidence of such acts may be extremely prejudicial.

[6] Fed.R.Evid. 404 notes of Advisory Committee on 1972 Proposed Rules at 228 (1993).

[7] The constitutional status of this transaction-based model of criminal law is evident in *Robinson* v. *California*, 370 U.S. 660, 82 S.Ct. 1417, 8 L.Ed.2d 758 (1962). *See* Lynch, *supra* note 1, at 934.

Unfortunately, prosecutors—with some encouragement from the courts[8]—are too often tempted to read the exceptions to this rule as the rule itself. As a result, what ought to be a narrow evaluation of the evidence relevant to particular incidents that took place at a particular moment in time is broadened into an examination of the defendant's lifestyle, habits and character. In effect, the defendant as criminal is on trial, not simply the defendant in relation to a specific crime. Although bad act evidence, when relevant for demonstrating, for example, motive, opportunity, or intent, is nonetheless inadmissible under Rule 403 of the Federal Rules of Evidence if the danger of unfair prejudice substantially outweighs its probative value, this is hardly a powerful safeguard. First, some unfair prejudicial effect is explicitly anticipated, even for evidence found admissible under Rule 403; only when the danger of unfair prejudice reaches an unacceptable level is the evidence barred, and prosecutors tend not to recognize when that level has been reached. Second, the weighing of prejudice versus probative value is inherently imprecise, for no matter how conscientious and careful the district court may be, it cannot calibrate its measurements to adjust for the unpredictable and subjective sensitivities of different jurors. Moreover, the exercise of discretion of district judges in this area is rarely overturned by the court of appeals. While these considerations are relevant for any Rule 403 evaluation, they are particularly salient with regard

[8] *See Huddleston* v. *United States*, 485 U.S. 681, 108 S.Ct. 1496, 99 L.Ed.2d 771 (1988); *Dowling* v. *United States*, 493 U.S. 342, 110 S.Ct. 668, 107 L.Ed.2d 708 (1990).

to bad act evidence, the prejudicial effect of which is a given, and the admission into evidence of which turns the focus of the trial from the crime to the criminal.

Whether it be misuse of the charging power or reliance on improper character evidence, the problem—and the solution—is essentially the same. Prosecutors know the utility of such abusive methods in winning a conviction; they need to be equally aware of the unfairness and the harm caused to our system of justice when convictions are won in this manner. Prosecutors must keep in mind that they are differently situated than defense counsel, whose responsibility to defend their clients means that within the limits of the law they should do their utmost to win a case. The prosecutor's client is the justice system. Accordingly, "[t]he duty of the prosecutor is to seek justice, not merely to convict." ABA Standards Relating to the Function of the Prosecutor 3-1.1(c).[9] Winning a conviction because of overcharging or presenting the jury with evidence of the defendant's extrinsic bad acts does not serve the ends of justice.[10]

Although we reverse Robertson's RICO conviction for the reasons explained in Judge Nelson's

[9] As this court has recently found it necessary to remind prosecutors (*see United States* v. *Kojayan*, 8 F.3d 1315, 1324 (9th Cir.1993), the desire to win a conviction should never eclipse the more important responsibility of serving justice.

[10] *See United States* v. *Jones*, 559 F.2d 960, 961 (5th Cir.), *reh'g denied*, 564 F.2d 98 (1977), *cert. denied*, 434 U.S. 1021, 98 S.Ct. 747, 54 L.Ed.2d 769 (1978): "It would be a miscarriage of justice if a defendant were found guilty of one offense simply because the jury felt he should be punished because of participation in other offenses for which he is not on trial."

unanimous opinion for the court, the overwhelming evidence supporting his drug convictions necessitates a finding of harmless error with respect to some of the bad acts evidence and precludes us from reversing the district court's judgment on those counts. It should be emphasized, however, that in a closer case a full reversal might well have been warranted. Future prosecutors faced with similar circumstances would be well-advised to focus their attention more carefully on prosecuting the defendant under charges appropriate to his crimes, and on distinguishing legitimate substantive evidence from evidence of bad acts that serves principally to prejudice the jurors.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 92-50395
D.C. No. 90-0925-01-LCN

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

JUAN PAUL ROBERTSON, DEFENDANT-APPELLANT

No. 92-50460
D.C. No. 90-0925-01-LCN

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

JUAN PAUL ROBERTSON, DEFENDANT-APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
Leland C. Nielsen, Senior District Judge, Presiding

[Filed Apr. 26, 1994]

ORDER

Before: REINHARDT, T.G. NELSON, CIRCUIT JUDGES, AND KAUFMAN,* DISTRICT JUDGE.

The panel has voted to deny Robertson's and the United States' petitions for rehearing and to reject the suggestions for rehearing en banc.

The petitions for rehearing and suggestions for rehearing en banc were circulated to the full court and no timely request for en banc rehearing was made by any active judge.

The petitions for rehearing are denied and the suggestions for rehearing en banc are rejected.

---

* Honorable Frank A. Kaufman, Senior United States District Judge for the District of Maryland, sitting by designation.

OPPOSITION BRIEF

Supreme Court, U.S.
F I L
SEP 13 1994
OFFICE OF THE CLERK

94-251

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

NO. _____

UNITED STATES OF AMERICA,

PETITIONER,

-vs-

JUAN ROBERTSON,

RESPONDENT.

MOTION FOR LEAVE TO PROCEED

IN FORMA PAUPERIS

Pursuant to Title 18, United States Code section 3006A(d)(6) and Rule 39 of this Court, Respondent Juan Paul Robertson asks leave to file the enclosed Response to Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit without prepayment of fees or costs and to proceed in forma pauperis.

Respondent was represented by counsel appointed pursuant to Title 18, United States Code section 3006A on appeal to the Ninth Circuit Court of Appeals.

Respectfully submitted,

DATED: September 13, 1994

GLENN STEWART WARREN
Attorney for Respondent
JUAN PAUL ROBERTSON

9 pp

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

NO. _____

UNITED STATES OF AMERICA,

PETITIONER,

-vs-

JUAN ROBERTSON,

RESPONDENT.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

GLENN STEWART WARREN
2442 Fourth Avenue
San Diego, CA. 92101
(619) 236-8058

Attorney for Respondent
JUAN ROBERTSON

TOPICAL INDEX

Table of Authorities..... ii

ARGUMENT

THE DECISION OF THE NINTH CIRCUIT DOES NOT CONFLICT WITH DECISIONS OF OTHER CIRCUITS ON THE INTERSTATE COMMERCE ISSUE..... 1

CONCLUSION..... 3

CERTIFICATE OF SERVICE..... 4

TABLE OF AUTHORITIES

Cases	Page(s)
United States v. Doherty, 867 F.2d 47 (1st Cir.), cert. denied, 92 U.S. 918 (1989)	1
United States v. Muskovsky, 863 F.2d 1319 (7th Cir. 1988)	2
United States v. Rhone, 598 F.2d 564 (9th Cir. 1979)	3
United States v. Nerone, 563 F.2d 836 (7th Cir. 1977)	3

COMES NOW respondent, Juan Paul Robertson, and replies to the Petition for Writ of Certiorari filed by Petitioner.

I.

THE DECISION OF THE NINTH CIRCUIT DOES NOT CONFLICT WITH DECISIONS OF OTHER CIRCUITS ON THE INTERSTATE COMMERCE ISSUE

Contrary to the position of the government, the decision of the Ninth Circuit Court of Appeals does not conflict with decisions of other circuits or other decisions of the Ninth Circuit on the issue of interstate commerce.

All of the cases cited by Petitioner in support of its argument that ". . . RICO's requirements are fully satisfied by a showing that the enterprise purchased supplies or hired employees from outside the State, or that its activities otherwise caused persons or property to travel across state lines . . . " involve 18 U.S.C. § 1962 (c). This section states that

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, where the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

In the cases cited by petitioner, enterprises existed which conducted illegal activities. The courts found sufficient interstate activity to support a RICO prosecution either because the activity of the enterprise had a potential effect on interstate commerce, e.g., United States v. Doherty, 867 F.2d 47 (1st Cir.),

Cert. denied, 492 U.S. 918 (1989) or because the enterprise purchased supplies and materials from out of state. e.g., United States v. Muskovsky, 863 F.2d 1319 (7th Cir. 1988).

The instant case by contrast, involves 18 U.S.C. 1962 (a) which makes it unlawful

> to use or invest, directly or indirectly, any part of such [racketeering] income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

The gravamen of a §1962(a) violation, then, is the use of proceeds from racketeering activity either to establish or to operate an enterprise. It is immaterial whether the enterprise itself is engaged in, or facilitates, ongoing unlawful activity.

With respect to the requirement under §1962(a) that the "enterprise" affect interstate commerce, it is a well established rule that the activity of the enterprise and not the predicate acts have an effect on interstate commerce. United States v. Rhone, 598 F.2d 564, 573 (9th Cir. 1979); United States v. Nerone, 563 F.2d 836, 852-854 (7th Cir. 1977).

Apart from the predicate acts, interstate activities in this case included the sending of materials and supplies from the continental United States to Alaska to establish the mining enterprise. These activities do not fall within §1962(a) since they do not involve the operation of the enterprise but rather the establishment of the enterprise.

Once the mining enterprise was established, there is no

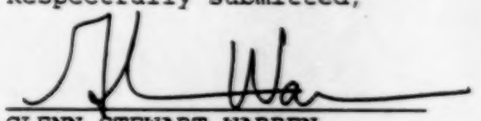
evidence that it had any but the most incidental connection with interstate commerce. Petitioner's argument that this supports a RICO prosecution compels the conclusion that any time monies derived from related illegal activities are used to create an enterprise, even in the same state as the activities, a RICO prosecution will lie. This makes the concept of "interstate commerce" meaningless.

II.

CONCLUSION

For the foregoing reasons, it is submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,



GLENN STEWART WARREN
Attorney for Respondent
JUAN PAUL ROBERTSON

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

NO._____

JUAN ROBERTSON,

PETITIONER,

-vs-

UNITED STATES OF AMERICA,

RESPONDENT.

PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss:
COUNTY OF SAN DIEGO)

GLENN STEWART WARREN, being first duly sworn, deposes and says:

That he is a member of the Bar of the Supreme Court of the United States;

That on September 13, 1994, the original and twelve copies of the response to the government's petition for writ of certiorari in the above-entitled case was deposited in a United States Post Office mailbox located in San Diego, California, with first class postage prepaid, properly addressed to the Clerk of the Supreme Court of the United States and with time allowed for filing said petition;

That an additional copy of the response the was served on counsel for respondent:

The Honorable Drew S. Days, III
Solicitor General of the United States
Department of Justice
Washington, D.C. 20530

Dated at San Diego, California this 13th day of September, 1994.

GLENN STEWART WARREN

Supreme Court, U.S.
FILED
SEP 22 1994
OFFICE OF THE CLERK

No. 94-251

In the Supreme Court of the United States

OCTOBER TERM, 1994

UNITED STATES OF AMERICA, PETITIONER

v.

JUAN PAUL ROBERTSON

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

DREW S. DAYS, III
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

BEST AVAILABLE COPY

TABLE OF AUTHORITIES

Cases:	Page
Estate of Cowart v. *Nicklos Drilling Co.*, 112 S. Ct. 2589 (1992)	2
H.J. Inc. v. *Northwestern Bell Tel. Co.*, 492 U.S. 229 (1989)	2
Musick v. *Burke*, 913 F.2d 1390 (9th Cir. 1990)	2, 3
Reves v. *Ernst & Young*, 113 S. Ct. 1163 (1993)	2
Scarborough v. *United States*, 431 U.S. 563 (1977)	3
United States v. *Bagnariol*, 665 F.2d 877 (9th Cir. 1981), cert. denied, 456 U.S. 962 (1982)	2, 4
United States v. *Murphy*, 768 F.2d 1518 (7th Cir. 1985), cert. denied, 475 U.S. 1012 (1986)	4
United States v. *Nerone*, 563 F.2d 836 (7th Cir. 1977), cert. denied, 435 U.S. 951 (1978)	4
United States v. *Rone*, 598 F.2d 564 (9th Cir. 1979), cert. denied, 445 U.S. 946 (1980)	2, 4
Constitution and statutes:	
U.S. Const. Art. I § 8, Cl. 3 (Commerce Clause)	3
18 U.S.C. 1962(a)	2, 3
18 U.S.C. 1962(b)	2
18 U.S.C. 1962(c)	2

In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-251

UNITED STATES OF AMERICA, PETITIONER

v.

JUAN PAUL ROBERTSON

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

Respondent does not attempt to defend on its own terms the Ninth Circuit's conclusion that the movement of people and goods to Alaska from the lower 48 States in connection with the activities of a business "enterprise" cannot establish that the activities of that enterprise "affect[ ] interstate * * * commerce" within the meaning of RICO. As we have demonstrated (Pet. 13-15), that conclusion seriously disserves the goals that Congress intended to achieve in enacting RICO, will cause confusion among jurors who must be instructed on the interstate element of RICO, and will raise doubts about the applicability of scores of federal statutes in Alaska and other isolated areas of the country. This Court should correct the Ninth Circuit's error and resolve the conflict it created with the decisions of seven other circuits.

1. Respondent's principal contention (Br. in Opp. 1-2) is that the Ninth Circuit's decision does not conflict with the decisions of other circuits, because he was convicted under 18 U.S.C. 1962(a), and every court of appeals that has taken a different view of the interstate commerce requirement has done so in cases brought under 18 U.S.C. 1962(c). Each subsection of RICO, however, uses identical language to require proof of an enterprise "engaged in, or the activities of which affect, interstate or foreign commerce." 18 U.S.C. 1962(a), (b) and (c). Because it is a "basic canon of statutory construction that identical terms within an Act bear the same meaning," *Estate of Cowart* v. *Nicklos Drilling Co.*, 112 S. Ct. 2589, 2596 (1992); see also *Reves* v. *Ernst & Young*, 113 S. Ct. 1163, 1169 (1993), there is no basis for respondent's contention that the same interstate nexus requirement should be interpreted differently depending on the subsection of RICO in which it appears.[1]

Moreover, respondent's contention is flawed on its own terms, because the Ninth Circuit did not purport to fashion a separate test for the interstate commerce element of Section 1962(a). To the contrary, each of the cases the Ninth Circuit cited in support of its conclusion was brought under Section 1962(c). See Pet. App. 8a-9a; *Musick* v. *Burke*, 913 F.2d 1390, 1398 (9th Cir. 1990); *United States* v. *Bagnariol*, 665 F.2d 877, 892 (9th Cir. 1981), cert. denied, 456 U.S. 962 (1982); *United States* v. *Rone*, 598 F.2d 564, 573 (9th Cir. 1979), cert. denied, 445 U.S. 946 (1980). There is therefore no basis for believing

[1] Respondent might just as plausibly suggest that the "pattern" requirement of RICO, which also is shared by all RICO offenses, should be interpreted differently depending on the subsection of RICO at issue. This Court, however, adopted a single approach to that issue in a case that raised claims under each subsection of RICO. See *H.J. Inc.* v. *Northwestern Bell Tel. Co.*, 492 U.S. 229, 233-234 (1989).

that the Ninth Circuit's ruling in this case can or will be limited to cases brought under Section 1962(a). Indeed, the precedent that the court found dispositive of the interstate nexus issue (Pet. App. 9a-10a) held that the jurisdictional reach of RICO "extends to the constitutional limits of Congress' power to regulate interstate commerce." *Musick* v. *Burke*, 913 F.2d at 1398. The Ninth Circuit therefore necessarily held that the activities proved by the government in this case cannot be reached by *any* statute that Congress might enact. That result is contrary to this Court's cases construing the reach of Congress's power under the Commerce Clause (see Pet. 8-13) and is sufficiently important to warrant this Court's attention.

2. Respondent also suggests (Br. in Opp. 2) that his shipment of materials and supplies to Alaska should be excluded from the determination whether the activities of the enterprise affected interstate commerce, because those shipments did not "involve the operation of the enterprise but rather the establishment of the enterprise." Respondent, however, points to nothing in RICO to support the legal significance of that distinction, or to demonstrate that Congress intended to require proof that the enterprise engaged in interstate commerce after the defendant captured it. See Br. in Opp. 2-3. As we have demonstrated (Pet. 8-9), Congress's use of the phrase "affect commerce" establishes that no such requirements were intended. See *Scarborough* v. *United States*, 431 U.S. 563, 564 n.1, 575 (1977) (in crime of "possess[ing] * * * affecting commerce * * * any firearm," jurisdictional element is satisfied by proof that the firearm was shipped in commerce at any point in time, even if that occurred before the defendant acquired the firearm).

Moreover, because respondent "establish[ed]" the enterprise for the purpose of engaging in the gold mining business, it is difficult to see in this case how the interstate

shipment of equipment and materials necessary to conduct that business, which were then used in the day-to-day activities of the gold mine, can possibly be disassociated from "the operation of the enterprise." Br. in Opp. 2.[2] In any event, respondent does not dispute (1) that he and his employees traveled between Alaska and the lower 48 States throughout the period of ownership, (2) that the mine sold a significant amount of gold in Alaska, or (3) that he mortgaged his Phoenix, Arizona, home to finance the operation of the gold mine. As we have demonstrated, those activities were sufficient by themselves to prove that the enterprise's activities affected interstate commerce under the correct legal standard. See Pet. 10-13.

* * * * *

[2] Citing *United States* v. *Rone, supra,* and *United States* v. *Nerone,* 563 F.2d 836 (7th Cir. 1977), cert. denied, 435 U.S. 951 (1978), respondent also suggests in passing (Br. in Opp. 2) that the interstate character of predicate acts of racketeering may not be considered in determining whether the activities of the enterprise affected interstate commerce. Respondent is mistaken. The principle to which he adverts merely holds that when the government proves that the activities of the enterprise affect commerce, it need not *also* prove that the racketeering acts or the activities of each defendant independently affected commerce. See, *e.g., United States* v. *Bagnariol,* 665 F.2d 877, 892-893 (9th Cir. 1981), cert. denied, 456 U.S. 962 (1982); *United States* v. *Murphy,* 768 F.2d 1518, 1531 (7th Cir. 1985), cert. denied, 475 U.S. 1012 (1986). That principle does not preclude consideration of the racketeering conduct or the acts of the particular defendant to the extent those matters are logically relevant to whether the activities of the enterprise affected interstate commerce. See *United States* v. *Bagnariol,* 665 F.2d at 893 (rejecting similar claim based on *Rone* and *Nerone*; predicate acts not considered if they are "unrelated to the activities of the enterprise," but case law "demonstrate[s] that the same acts that satisfy the interstate commerce nexus to the enterprise also may be alleged as predicate acts").

For the foregoing reasons and those set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

SEPTEMBER 1994

☆ U.S. GOVERNMENT PRINTING OFFICE: 1994—301-157/86209

Supreme Court, U.S.
FILED
DEC 1 1994
OFFICE OF THE CLERK

(4)

No. 94-251

In the Supreme Court of the United States

OCTOBER TERM, 1994

UNITED STATES, PETITIONER

v.

JUAN PAUL ROBERTSON, RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT APPENDIX

GLENN STEWART WARREN
2442 Fourth Avenue
San Diego, CA 92101
(619) 236-8058
Counsel for Respondent

DREW S. DAYS, III
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217
Counsel for Petitioner

PETITION FOR WRIT OF CERTIORARI FILED AUGUST 10, 1994
CERTIORARI GRANTED OCTOBER 17, 1994

81 pp

TABLE OF CONTENTS

	Page
District Court Docket Entries	1
Superseding Indictment	29
Jury Instructions	43
Judgment in a Criminal Case	74
Order Granting Certiorari	79

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Criminal Case No. 90-00925-01

UNITED STATES OF AMERICA, PLAINTIFF

v.

JUAN PAUL ROBERTSON, DEFENDANT

DOCKET ENTRIES

Date	PROCEEDINGS
10/04/90	Notice filed (Related to CR-87-0288-JLI.) (Dkt'd 10/12/90).
	Filed indictment (Indictment ordered sealed on 10/4/90. Unsealed on 10/5/90 by Magistrate McKee order.) (Dkt'd 10/12/90).
	Bail not allowed (Detained purs to 18:3142(d)—per G/J.) (MAG McKEE) (Dkt'd 10/12/90).
	Order bench warrant issued (per G/J) (MAG McKEE) (Dkt'd 10/12/90).
	Bench warrant issued (CLERK) (Dkt'd 10/12/90).
	Case assigned to JUDGE IRVING (Dkt'd 10/12/90).
10/05/90	Order filed (unsealing indictment) (MAG McKEE) (Dkt'd 10/12/90).
10/11/90	Appearance of WOOD, DAVID as attorney for defendant (MAG MOSKOWITZ) (Dkt'd 10/12/90).

Date	PROCEEDINGS
	Defendant appears with counsel (Purs to 18:3161 (c) (2)) (Dkt'd 10/12/90).
	Defendant's first appearance (MAG MOSKOWITZ) (Dkt'd 10/12/90).
	Bail not allowed (MAG McKEE) (Dkt'd 10/12/90).
	Detention hearing set for 10/16/90 @ 10:30 AM (before Mag McKee) (MAG MOSKOWITZ) (Dkt'd 10/12/90).
	Arraignment held (Counts 1-8) (MAG MOSKOWITZ) (Dkt'd 10/12/90).
	Defendant enters plea of not guilty (Counts 1-8) (MAG MOSKOWITZ) (Dkt'd 10/12/90).
	Motion and trial setting continued to 10/16/90 @ 10:30 AM (Counts 1-8) (before Judge Irving) (MAG MOSKOWITZ) (Dkt'd 10/12/90).
	—Mag Moskowitz recuses himself. (MAG MOSKOWITZ) (Dkt'd 07/03/91).
10/15/90	Minute sheet filed (atty David Wood relieved) (JUDGE IRVING) (Dkt'd 10/16/90).
	—Ct refers dft to Mag McKee for appt of new consl (JUDGE IRVING) (Dkt'd 10/16/90).
	Appearance of attorney FEDERAL-DEFENDERS, INC (MAG McKEE) (Dkt'd 10/16/90).
	Detention hearing reset to 10/16/90 @ 2:00 PM (Financial afdt w/b fld w/crt by 10/16/90 & may cont to 10/18/90 @ 10:30) (MAG McKEE) (Dkt'd 10/16/90).
	Motion and trial setting continued to 10/22/90 @ 9:00 AM (Counts 1-8) (for status) (JUDGE IRVING) (Dkt'd 10/16/90).
10/16/90	Detention hearing continued to 10/18/90 @ 10:30 AM (MAG McKEE) (Dkt'd 10/16/90).
10/18/90	Detention hearing held (MAG McKEE) (Dkt'd 10/23/90).
	Bail not allowed (flight risk & threats) (MAG McKEE) (Dkt'd 10/23/90).

Date	PROCEEDINGS
	—fld financial afdt under seal. Gvt to prepare order. (MAG McKEE, (Dkt'd 10/23/90).
	Bond (fld proffer of info from Judy Clarke in suppt of detention) (Dkt'd 10/23/90).
	Bond (fld financial afdt. Ord sealed & placed in vault by crt.) (MAG McKEE) (Dkt'd 10/23/90).
	Received documents transferred pursuant to Rule 40 from 0973-2 (Rcvd the following docs from Central District of Ca in Los Angeles: cc of magistrate's warrant of removal, cc of final commitment, cc of afdt re out of district warrant, cc of record of proceedings & cc of dkt sheet.) (Dkt'd 10/23/90).
10/22/90	Motion and trial setting hearing held (Counts 1-8) (JUDGE IRVING) (Dkt'd 10/23/90).
	Status hearing set for 10/26/90 @ 2:00 PM (JUDGE IRVING) (Dkt'd 10/23/90).
10/23/90	Filed bench warrant returned executed, executed on 10/11/90 (Dkt'd 10/23/90).
10/24/90	Bail not allowed (Fld findings of fact and ord of detention pending trial. Ent'd on 10/25/90.) (MAG McKEE) (Dkt'd 10/25/90).
10/26/90	Bond (Fld further proffer of info in suppt of request to grant conds of release.) (Dkt'd 11/06/90).
	Status hearing held (bail hrg—1st day Swore wits & fld exhbs) (JUDGE IRVING) (Dkt'd 11/06/90).
	Bail hearing set for 10/30/90 @ 9:00 AM (JUDGE IRVING) (Dkt'd 11/06/90).
10/29/90	—tape to be sealed, in camera—sealed. (MAG McKEE) (Dkt'd 11/06/90).
10/30/90	Bail hearing held (2nd day—wits & fld exhbs) (JUDGE IRVING) (Dkt'd 11/06/90).

Date	PROCEEDINGS
	Bail hearing continued to 10/31/90 @ 2:00 PM (JUDGE IRVING) (Dkt'd 11/06/90). —Declaration in camera—financial (sealed & placed in vault) (Dkt'd 07/03/91).
10/31/90	Bail hearing held (3rd day—Swore wits & fld exhbs) (JUDGE IRVING) (Dkt'd 11/06/90). Bail hearing continued to 11/01/90 @ 9:00 AM (JUDGE IRVING) (Dkt'd 11/06/90).
11/01/90	Bail hearing held (4th day —) (JUDGE IRVING (Dkt'd 11/06/90). Bail hearing continued to 11/05/90 @ 10:30 AM (JUDGE IRVING) (Dkt'd 11/06/90).
11/05/90	Bail hearing held (5th day—Swore wits) (JUDGE IRVING) (Dkt'd 11/14/90). Bail hearing continued to 11/07/90 @ 9:00 AM (JUDGE IRVING) (Dkt'd 11/14/90).
11/07/90	Bail hearing held (6th day—Swore wits & fld exhbs.) (JUDGE IRVING) (Dkt'd 11/15/90). Bail affirmed (affirmed the decision of Mag McKee —Ct to file findings of fact.) (JUDGE IRVING) (Dkt'd 11/15/90).
11/09/90	Bail not allowed (fld findings of fact and ord of detention pending trial. Ent'd on 11/27/90.) (JUDGE IRVING) (Dkt'd 11/27/90).
11/19/90	Order case reassigned to JUDGE TURRENTINE (Judge Irving recuses himself from this case and orders this case to be reassigned. Dft mot to reconsider detention ord to be reset by new judge.) (JUDGE IRVING) (Dkt'd 11/27/90).
11/20/90	Filed stipulation between the government and defendant (fld stipulated facts and agreement re case complex) (JUDGE IRVING) (Dkt'd 11/28/90).
11/21/90	—fld mot to shorten time (Dkt'd 11/28/90).

Date	PROCEEDINGS
	Order filed (to shorten time) (JUDGE IRVING) (Dkt'd 11/28/90). Motion filed (MOT #1) (for reconsideration of detention ord) (Dkt'd 11/28/90).
12/03/90	Order case reassigned to JUDGE NIELSEN (JUDGE TURRENTINE) (Dkt'd 12/05/90).
12/04/90	Motion by government filed (MOT #2) (for reciprocal discovery) (Dkt'd 12/06/90). Filed memorandum in support of motion by government (MOT #2) (t/w pts & auths) (Dkt'd 12/06/90).
12/10/90	Status hearing set for 01/02/91 @ 2:00 PM (JUDGE NIELSEN) (Dkt'd 12/16/90). Hearing on pre-trial motions set for 01/22/91 @ 2:00 PM (Counts 1-8) (JUDGE NIELSEN) (Dkt'd 12/16/90). Cause continued for trial setting to 01/22/91 @ 2:00 PM (Counts 1-8) (JUDGE NIELSEN) (Dkt'd 12/16/90). Motion hearing set for 12/19/90 @ 9:00 AM (MOT #1) (re mot to reconsider detention) (JUDGE NIELSEN) (Dkt'd 12/16/90).
12/12/90	—lodged ex parte appl for issuance of rule 17(b) subpoena and request for advance authorization of funds for witness (Dkt'd 12/16/90).
12/13/90	Order filed (for access to Law Library) (MAG McKee) (Dkt'd 12/16/90). Mark the beginning of a potential excludable period of type X-E starting on 11/21/90 ((In re MOTIONS/P on 11/21)) (Dkt'd 12/17/90).
12/18/90	—good cause appearing and on the crt's own mot —date of 1/2/91 is hereby vacated, and status hrg is re set for 1/3/91 @ 2:00 pm (JUDGE NIELSEN) (Dkt'd 12/27/90).

Date	PROCEEDINGS
12/19/90	Motion hearing held (MOT #1) (JUDGE NIELSEN) (Dkt'd 12/20/90). Motion granted (MOT #1) (JUDGE NIELSEN) (Dkt'd 12/20/90). Order personal appearance bail set in the amount of $500,000.00 (secured by property of mother and friends. Dft ord to have no contact with potential wits, Gvt may examine sureties.) (JUDGE NIELSEN) (Dkt'd 12/20/90). —crt orders case complex. (JUDGE NIELSEN) (Dkt'd 12/20/90). Mark the beginning of a potential excludable period of type X-T2 starting on 12/19/90 ((In re COMPLEX on 12/19)) (JUDGE NIELSEN) (Dkt'd 12/20/90). —fld dft's brief re detention hrg (Dkt'd 12/21/90).
01/03/91	Status hearing held (Eugene Iredale not able to appear generally at this time. Mot hrg date of 1/22/91 affirmed.) (JUDGE NIELSEN) (Dkt'd 01/90/91).
01/04/91	—fld mot to shorten time (Dkt'd 01/09/91). Order filed (to shorten time) (JUDGE NIELSEN) (Dkt'd 01/09/91). Motion filed (MOT #3) (to amend conds of release) (Dkt'd 01/09/91). —(MOT #3) (fld request to amend conds of release) (Dkt'd 01/09/91).
01/09/91	Order filed (fld appl for ord shortening time and ord thereon.) (JUDGE THOMPSON) (Dkt'd 01/15/91). Filed memorandum in opposiiton to motion (MOT #3) (t/w stmt of facts and argument) (Dkt'd 01/15/91).
01/10/91	—fld mot to shorten time (Dkt'd 01/15/91). Order filed (to shorten time) (JUDGE NIELSEN) (Dkt'd 01/15/91).

Date	PROCEEDINGS
	Motion for discovery/inspection filed (MOT #4) (Counts 1-8) (Dkt'd 01/15/91). Motion filed (MOT #5) (for leave to file addtnl mots) (Dkt'd 01/15/91). Filed memorandum in support of motion for discovery/inspection, and (MOT#s 4, 5) (t/w pts & auths) (Dkt'd 01/15/91). Motion denied (MOT #3) (denied at this time.) (JUDGE NIELSEN) (Dkt'd 01/18/91) Hearing set to 01/16/91 @ 8:30 AM (re mot to amend conds of release.) (JUDGE NIELSEN) (Dkt'd 01/18/91).
01/16/91	Hearing held (further hrg held—dft's mot to amend conds of release—denied.) (JUDGE NIELSEN) (Dkt'd 01/18/91).
01/18/91	Order filed (fld appl for ord shortening time and ord thereof.) (JUDGE NIELSEN (Dkt'd 01/24/91). Filed memorandum in opposition to motion for discovery/inspection, and (MOT#s 4, 5) (t/w pts & auths) (Dkt'd 01/24/91).
01/22/91	Hearing on pre-trial motions continued to 02/04/91 @ 2:00 PM (Counts 1-8) (JUDGE NIELSEN) (Dkt'd 01/24/91). Cause continued for trial setting to 02/04/91 @ 2:00 PM (Counts 1-8) (JUDGE NIELSEN) (Dkt'd 01/24/91).
02/04/91	Hearing on pre-trial motions continued to 02/11/91 @ 2:00 PM (Counts 1-8) (JUDGE NIELSEN) (Dkt'd 02/05/91). Cause continued for trial setting to 02/11/91 @ 2:00 PM (Counts 1-8) (JUDGE NIELSEN) (Dkt'd 02/05/91). Motion made in open court (MOT #6) (to be relieved as cnsl) (JUDGE NIELSEN) (Dkt'd 02/05/91).

Date	PROCEEDINGS
02/11/91	Hearing on pre-trial motions stricken 02/11/91 (Counts 1-8) (JUDGE NIELSEN) (Dkt'd 02/19/91).
	Cause stricken for trial setting (Counts 1-8) (JUDGE NIELSEN) (Dkt'd 02/19/91).
	Motion and trial setting continued to 02/19/91 @ 2:00 PM (Counts 1-8) (JUDGE NIELSEN) (Dkt'd 02/19/91).
	Attorney FEDERAL-DEFENDERS, INC deleted from case (JUDGE NIELSEN) (Dkt'd 02/19/91).
	Order appointing attorney WILLIAMSON, WARREN R to represent defendant (ct appts atty purs to CJA Section that requires dft to reimburse gvt.) (JUDGE NIELSEN) (Dkt'd 02/19/91).
	Bail hearing set for 02/19/91 @ 2:00 PM (JUDGE NIELSEN) (Dkt'd 02/19/91).
	Filed CJA Form #20 copy #5 appointing WILLIAMSON, WARREN R as attorney for defendant (JUDGE NIELSEN) (Dkt'd 02/19/91).
02/19/91	Motion and trial hearing held (Counts 1-8) (JUDGE NIELSEN) (Dkt'd 02/20/91).
	Hearing on pre-trial motions set for 04/29/91 @ 2:00 PM (Counts 1-8) (JUDGE NIELSEN) (Dkt'd 02/20/91).
	Cause continued for trial setting to 04/29/91 @ 2:00 PM (Counts 1-8) (JUDGE NIELSEN) (Dkt'd 02/20/91).
	Order filed (approving pymnt in excess of statutory maximum, interim pymnts for investigative services and sealing appls for pymnt) (JUDGE NIELSEN) (Dkt'd 02/20/91).
	Order filed (appting cnsl, a ord next) (JUDGE NIELSEN) (Dkt'd 02/20/91).

Date	PROCEEDINGS
02/21/91	—fld ex parte appl for services of law clerk/paralegal and request to seal appls for pymnt (Dkt'd 02/22/91).
02/27/91	Order filed (approving pymnt in excess of statutory maximum interim pymnts for law clerk/paralegal services and sealing appl for pymnt) (JUDGE NIELSEN) (Dkt'd 02/27/91).
03/04/91	Order filed (fld ord approving pymnt in excess of statutory maximum, interim pymnts for investigative services and sealing appls for pymnt t/w sig of Judge Harry Pregerson) (JUDGE NIELSEN) (Dkt'd 03/05/91).
	Order filed (7408 appt cnsl, authorizing interim pymnts in excess of maximum amt and sealing appls for pymnt t/w sig of Judge harry pregerson.) (Dkt'd 03/05/91).
03/15/91	Bail affirmed (Proposed surety Levona Jennings c/s/t) (JUDGE NIELSEN (Dkt'd 03/19/91).
03/18/91	Order filed (Ord approving payment in excess of statutory maximum interim payments for law clerk/paralegal services and sealing application for payment.) (JUDGE NIELSEN) (Dkt'd 03/19/91).
	Bail hearing held (Proposal surety Dick Jennings C/S/T. Defense to submit copy of Jennings Living Trust Documents.) (JUDGE NIELSEN) (Dkt'd 03/26/91).
03/19/91	Order filed (ExParte Application and order Re: Copies of documents from U.S. District Court Clerk, Based on Coutrs order appointing Warren Williamson counsel in the Crimnal Justice Act, It is authorized to provide copies from its files to Warren Williamson without charge.) (JUDGE NIELSEN) (Dkt'd 03/26/91).

Date	PROCEEDINGS
03/27/91	—Memorandum in support of request for bail (Dkt'd 07/09/91).
04/10/91	—Bail Memorandum and request for calendaring for release of defendant (JUDGE NIELSEN) (Dkt'd 04/11/91). —Declaration of Thomas Bryk (JUDGE NIELSEN) (Dkt'd 04/11/91). —Declaration of Kyle Bryk (JUDGE NIELSEN) (Dkt'd 04/11/91).
04/15/91	Order filed (Stipulation and order continuing pretrial motion hearings from 4-29-91 to 5-13-91) (JUDGE NIELSEN) (Dkt'd 04/19/91).
04/19/91	Bail hearing held (JUDGE NIELSEN) (Dkt'd 05/01/91). Order personal appearance bail set in the amount of $500,000.00 (t/w conds) (JUDGE NIELSEN) (Dkt'd 05/01/91). Filed personal appearance bond in the amount of $500,000.00 (JUDGE NIELSEN) (Dkt'd 05/01/91).
04/22/91	Hearing set to 04/25/91 @ 9:00 AM (Hearing re violation of conditions of release.) (JUDGE NIELSEN) (Dkt'd 05/02/91).
04/25/91	Hearing held (Ct awaits word from sureties before making a further order. Bond not in effect at this time.) (JUDGE NIELSEN) (Dkt'd 05/02/91). —Letter re: deft. ORDERED SEALED BY COURT. (Dkt'd 05/02/91). —Letter regarding defendnat sureties. (Dkt'd 05/06/91).
04/29/91	Removal hearing waived (Dkt'd 05/06/91). Order filed (Appointing counrsel, authorizing interim paymebnts in excess of maximum amount,

Date	PROCEEDINGS
	and sealing application for payment. U.S. Circuit Judge Harry Pregerson, signed this order.) (JUDGE NIELSEN) (Dkt'd 05/06/91). Motion for continuance filed (MOT#7) (Dkt'd 05/06/91). Motion filed (MOT#8) (for substitution of counsel.) (Dkt'd 05/06/91). Motion for discovery/inspection filed (MOT#9) (Counts 1-8) (Dkt'd for 05/06/91). Motion for severance/separate trial filed (MOT #10) (Counts 1-8) (to sever counts.) (Dkt'd 05/06/91). Motion to suppress evidence filed (MOT#11) (Counts 1-8) (sto suppress wiretap evidence.) (Dkt'd 05/06/91). Motion filed (MOT#12) (for personal voir dire and use of a juror questionnarie.) (Dkt'd 05/06/91). Motion filed (MOT#13) (for pretrial access to prosecution witnesses.) (Dkt'd 05/06/91). Motion filed (MOT#14) (for access to the jury list.) (Dkt'd 05/06/91). Motion filed (MOT#15) (to exclude hearsay.) (Dkt'd 05/06/91). Motion for continuance hearing set for 05/13/91 @ 2:00 PM (MOT#7) (Dkt'd 05/06/91). —(MOT#'s 7, 8, 9, 10, 11, 12, 13, 14, 15) (Table of contents and table of authorities.) (Dkt'd 05/06/91). Filed memorandum in support of motion for discovery/inspection, to suppress evidence, for severance/separate trial, for continuance, and (MOT#'s 7, 8, 9, 10, 11, 12, 13, 14, 15) (Dkt'd 05/06/91).
05/06/91	Filed memorandum in opposition to motion for discovery/inspection, to suppress evidence, for severance/separate trial, and (MOT#'s 9, 10, 11, 12, 13, 15) (Dkt'd 05/15/91).

Date	PROCEEDINGS
	Motion by government filed (MOT#16) (for reciprocal discovery) (Dkt'd 05/15/91).
05/08/91	Order filed (ord substituting counsel & appt counsel under CJA) (JUDGE NIELSEN) (Dkt'd 05/15/91).
	Attorney WARREN, GLENN STEWART added to case (effective 5/7/91 & present atty stays to 5/31/91 due to complex case) (JUDGE NIELSEN) (Dkt'd 05/15/91).
05/13/91	Hearing on pre-trial motions held 05/13/91 (Counts 1-8) (JUDGE NIELSEN) (Dkt'd 05/15/91).
	Motion for severance/separate trial, and denied (MOT#'s 10, 14) (JUDGE NIELSEN) (Dkt'd 05/15/91).
	Motion and for discovery, inspection granted in part: denied in part (MOT#'s 4, 9) (Gov't to notify deft by 7/15/91 of telephone tape they intend to use) (JUDGE NIELSEN) (Dkt'd 05/15/91).
05/20/91	Bail not allowed (ct ord deft detained w/out bail, govt tp prepare ord) (JUDGE NIELSEN) (Dkt'd 05/22/91).
05/24/91	Bail not allowed (Fld findings of fact & order of detention pending trial.) (JUDGE NIELSEN) (Dkt'd 05/28/91).
06/12/91	Motion filed (MOT#17) (for reconsideration of detention order.) (Dkt'd 06/13/91).
	Filed memorandum in support of motion (MOT# 17) (t/w p's & a's) (Dkt'd 06/13/91).
	—(MOT#17) (fld declaration of counsel.) (Dkt'd 06/13/91).
	Motion hearing set for 06/17/91 @ 2:00 PM (MOT#17) (Dkt'd 06/13/91).
	—Declaration (sealed & placed in vault) (Dkt'd 07/03/91).

Date	PROCEEDINGS
06/17/91	Cause stricken for trial setting (Counts 1-8) (Dkt'd 06/19/91).
	Motion for continuance hearing stricken (MOT# 7) (Dkt'd 06/19/91).
	Motion hearing stricken (MOT#17) (Dkt'd 06/19/91).
	Bail hearing set for 07/01/91 @ 2:00 PM (JUDGE NIELSEN) (Dkt'd 06/19/91).
07/01/91	Bail hearing held (JUDGE NIELSEN) (Dkt'd 07/05/91).
	Motion denied (MO#17) (JUDGE NIELSEN) (Dkt'd 07/05/91).
	Order filed (Transcript of in camera interview ordered released. (per m/o)) (JUDGE NIELSEN) (Dkt'd 07/05/91).
	Minute sheet filed (Letter to Judge Nielsen re deft ordered sealed. To be opened only by the Ninth Circuit Court of appeals.) (JUDGE NIELSEN) (Dkt'd 07/05/91).
	—Recd letter from Monica Neshat re drug problem (Dkt'd 07/05/91).
	—Filed declaration from Tim Robertson, brother of deft (Dkt'd 07/05/91).
	—Filed declaration of James Denike, brother-in-law of deft (Dkt'd 07/05/91).
	--Recd letter from inmate re deft (Dkt'd 03/04/92).
	Filed notice of interlocutory appeal (APPL#1) (Re detention order of May 28, 1991 and denial of motion to reconsider entered 7/1/91) (Dkt'd 07/10/91).
	Mark the beginning of a potential excludable period of type X-D starting on 07/08/91 ((In re APIF on)) (Dkt'd 07/10/91).
	Filed designation for record on appeal (Re testimony of Monica Neshat, bail) (Dkt'd 07/10/91).

Date	PROCEEDINGS
07/09/91	Notice of interlocutory appeal and docket entries transmitted to U.S. Court of Appeals (APPL# 1) (T/W Case information sheet, docket fee payment notification form, Judgment/order, Minute Order, CJA form 20, substitution of atty) (Dkt'd 07/10/91).
	—Declaration in clarification of motion to reconsider detention order (Dkt'd 07/10/91).
07/10/91	—Ex parte application for order granting deft library access at the MCC (Dkt'd 07/11/91).
	Order filed (Order allowing deft access to library in MCC) (JUDGE NIELSEN) (Dkt'd 07/11/91).
07/11/91	Bond (Court orders deft released. He is to report in person or by phonse to P/T Services daily while out and is to report back to court when is trial is over.) (JUDGE NIELSEN) (Dkt'd 07/11/91).
	Order bail in the amount of $500,000.00 reinstated (Issd abst to USM) (JUDGE NIELSEN) (Dkt'd 07/11/91).
08/12/91	Order filed (ord signed by Circuit judge Harry Pregerson approving pmt in excess of stat max interim pmts for law clk/paralegal serv & seal app for pmt) (Dkt'd 08/13/91).
08/15/91	Order filed (ord motn date be cont to 10/7/91 @ 2pm and trial date be cont until 11/19/91 @ 2pm) (JUDGE NIELSEN) (Dkt'd 08/16/91).
	Stipulation filed (motn hrg date cont to 10/7/91 @ 2pm & tr date cont 11/19/91 @ 2pm) (Dkt'd 08/16/91).
	Hearing on pre-trial motions continued to 10/07/91 @ 2:00 PM (Counts 1-8) (Dkt'd 08/16/91).
	Trial date set for 11/19/91 @ 2:00 PM (Counts 1-8) (per order) (JUDGE NIELSEN) (Dkt'd 08/16/91).

Date	PROCEEDINGS
	Defendant acknowledgment (that he is required to appear at motn hrg & trial) (Dkt'd 08/16/91).
09/04/91	Minute sheet filed (Courts exhibits A, B, D, & F & court exht E, sealed 11/7/91 are unsealed for in camera review re discoverability as to case # 91 0082-B (BTM), resealed 9/4/91) (MAG MOSKOWITZ) (Dkt'd 09/06/91).
09/09/91	—Ex parte applic for funds for legal assist-ORD SEALED AND PLACED IN VAULT. (JUDGE NIELSEN) (Dkt'd 09/11/91).
	Order filed (FOR Ufor atty fees-ORD SEALED AND PLACED IN VAULT.) (JUDGE NIELSEN) (Dkt'd 09/11/91).
	—ex parte applic for appt of investigator, ORD SEALED AND PLACED IN VAULT. (JUDGE NIELSEN) (Dkt'd 09/11/91).
	Order filed (Ord for private investigator-ORD SEALED AND PLACED IN VAULT.) (JUDGE NIELSEN) (Dkt'd 09/11/91).
	—ex parte applic for expert services-ORD SEALED AND PLACED IN VAULT. (JUDGE NIELSEN) (Dkt'd 09/11/91).
	Order filed (for expert services-ORD SEALED AND PLACED IN VAULT.) (JUDGE NIELSEN) (Dkt'd 09/11/91).
09/26/91	—exparte application for ord shortening time to fld motions and leave tp file in excess of 25 pages (Dkt'd 09/26/91).
	—decl of atty (Dkt'd 09/26/91).
	Order filed (that deft may fld mtns in excess of 25 pages & that time is shorten for fld motions, AUSA will respond by noon 10/3/91) (JUDGE KEEP) (Dkt'd 09/26/91).
	Motion to dismiss filed (MOT#18) (Counts 1-8) (ct 6-as unconstitutionally vague) (Dkt'd 09/26/91).

Date	PROCEEDINGS
	Motion to dismiss filed (MOT#19) (Count 6) (as it fails to allege a pattern of recketeering activity) (Dkt'd 09/26/91).
	Motion to dismiss filed (MOT#20) (Count 6) (because it fails to allege continuity plus relationship) (Dkt'd 09/26/91).
	Motion to dismiss filed (MOT#21) (Count 6) (because venue is improper in Southern Distr of CA) (Dkt'd 09/26/91).
	Motion filed (MOT#22) (to strike paragraphs 2 & 3 of ct 6) (Dkt'd 09/26/91).
	Motion to dismiss filed (MOT#23) (Counts 1-8) (to dism racketeering act 6 as duplicitious or compel govt to make an election) (Dkt'd 09/26/91).
	Motion to dismiss filed (MOT#24) (Counts 1-8) (to dism racketeering act 6 or strike any reference to one 1979 Cadillac sedan de Ville automobile) (Dkt 09/26/91).
	Motion filed (MOT#25) (to strike racketeering acts 10 & 11) (Dkt'd 09/26/91).
	Motion to suppress evidence filed (MOT#26) (Counts 1-8) (drug ledgers) (Dkt'd 09/26/91).
	Motion for a bill of particulars filed (MOT#27) (Counts 1-8) (Dkt'd 09/26/91).
	Motion filed (MOT#28) (for witness list) (Dkt'd 09/26/91).
	Motion to suppress evidence filed (MOT#29) (Counts 1-8) (wire tap evidence) (Dkt'd 09/26/91).
	Motion to dismiss filed (MOT#30) (Counts 1-8) (based upon prosecutorial misconduct) (Dkt'd 09/26/91).
	Motion filed (MOT#31) (lv to file fur mot) (Dkt'd 09/26/91).
	Memorandum in support of motion for a bill of particulars, to dismiss, to suppress evidence, and (MOT#'s 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31) (Dkt'd 09/26/91).

Date	PROCEEDINGS
10/03/91	Order filed (per app for order shortening time & order thereon to file motions & response for Govt) (JUDGE NIELSEN) (Dkt'd 10/04/91).
	Order filed (per motion for leave to file memo in excess of 25 pgs & order thereon to allow Govt memo be recd & filed w/clerk's office) (JUDGE NIELSEN) (Dkt'd 10/04/91).
	Filed memorandum in opposition to motion for a bill of particulars, to dismiss, to suppress evidence, and (MOT#'s, 5, 18, 19, 20, 21, 22, 23, 25, 26, 27, 28, 30) (t/w stmt of facts & memo of P's & A's) (Dkt'd 10/04/91).
10/07/91	Hearing on pre-trial motions held 10/07/91 (Counts 1-8) (JUDGE NIELSEN) (Dkt'd 10/08/91).
	Hearing on pre-trial motions continued to 11/18/91 @ 2:00 PM (Counts 1-8) (for any additional motions that are filed) (JUDGE NIELSEN) (Dkt'd 10/08/91).
	Motion for a bill of particulars, to dismiss, to suppress evidence, for continuance, and denied (MOT#'s 5, 7, 8, 11, 12, 13, 15, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31) (JUDGE NIELSEN) (Dkt'd 10/08/91).
10/16/91	Order filed (re fees, ord for sealing of decl & ord) (JUDGE NIELSEN) (Dkt'd 10/1/91).
	—Declaration (Dkt'd 10/21/91).
10/17/91	Filed superseding indictment (Dkt'd 10/21/91).
10/22/91	—Waiver signed by deft re s/s indi being filed & being tried in less than 30 days after initial appearance. Trial date will stand for 11/19/91 (Dkt'd 10/23/91).
10/23/91	Petition for writ of habeas corpus ad testificandum (JUDGE KEEP) (Dkt'd 10/24/91).
	Issued writ of habeas corpus ad testificandum (Dkt'd 10/24/91).

Date	PROCEEDINGS
11/01/91	—Ex-parte app for order directing INS to comply (ordered sealed & placed in vault) (Dkt'd 11/04/91).
	Order filed (order (sealed & placed in vault)) (MAG McKEE) (Dkt 11/04/91).
	—ex-parte app for order directing Maricopa County atty to comply (sealed & placed in vault) (Dkt'd 11/04/91).
	Order filed (order (sealed & placed in vault)) (MAG McKEE) (Dkt'd 11/04/91).
11/04/91	—ex-parte application for order granting funds, declaration (sealed & placed in vault) (Dkt'd 11/05/91).
	Order filed (ord granting funds (sealed & placed in vault)) (JUDGE NIELSEN) (Dkt'd 11/05/91).
	Arraignment held (Counts S1-S8) (JUDGE NIELSEN) (Dkt'd 01/24/92).
	Defendant enters plea of not guilty (Counts S1-S8) (JUDGE NIELSEN) (Dkt'd 01/24/92).
	Motion made in open court to suppress evidence (MOT#32) (Counts 1-8, S1-S8) (JUDGE NIELSEN) (Dkt'd 11/08/91).
	Motion to suppress evidence denied (MOT#32) (JUDGE NIELSEN) (Dkt'd 11/08/91).
	Motion made in open court for continuance (MOT #33) (JUDGE NIELSEN) (Dkt'd 11/08/91).
	Motion for continuance taken under advisement (MOT#33) (under submission) (JUDGE NIELSEN) (Dkt'd 11/08/91).
	Order of excludable delay began on 12/19/90 and ended on 11/04/91 (Dkt'd 11/08/91).
	—Fld declaration of counsel (Dkt'd 03/04/92).
11/12/91	Hearing on pre-trial motions stricken 11/12/91 (Counts 1-8) (Dkt'd 01/24/92).
	Trial date stricken (Counts 1-8) (Dkt'd 01/24/92).

Date	PROCEEDINGS
	Trial date set for 01/22/92 @9:00 AM (Counts 1, 2-4, 5, 6, 7, 8, S1, S2, S3, S4, S5, S6, S7, S8) (JUDGE NIELSEN) (Dkt'd 01/24/92).
11/27/91	—ex-parte app for order authorizing interim payments (sealed & placed in vault) (Dkt'd 12/06/91).
	Order filed ((sealed & placed in vault)) (JUDGE NIELSEN) (Dkt'd 12/06/91).
	—declaration (sealed & placed in vault) (Dkt'd 12/06/91).
	—exparte app for order re interim payments (sealed & placed in vault) (Dkt'd 12/06/91).
	Order filed ((sealed & placed in Vault)) (JUDGE NIELSEN) (Dkt'd 12/06/91).
	—declaration (sealed & placed in vault) (Dkt'd 12/06/01).
	—ex-parte app re expert witness funds (sealed & placed in vault) (Dkt'd 12/06/91).
	Order filed (sealed & placed in vault)) (JUDGE NIELSEN) (Dkt'd 12/06/91).
	—declaration in support of ex-parte app re expert (sealed & placed in vault) (Dkt'd 12/06/91).
12/04/91	—ex-parte app for funds for expert witness (sealed & placed in vault) (Dkt'd 12/09/91).
	—Declaration (sealed & placed in vault) (Dkt'd 12/09/91).
	Order filed (sealed & placed in vault)) (JUDGE NIELSEN) (Dkt'd 12/09/91).
	—ex-parte app for funds for expert witness (sealed & placed in vault) (Dkt'd 12/09/91).
	—Declaration (sealed & placed in vault) (Dkt'd 12/09/91).
	Order filed ((sealed & Placed in vault)) (JUDGE NIELSEN) (Dkt'd 12/09/91).
	—ex-parte app for interim payments to investigators (sealed & placed in vault) (Dkt'd 12/09/91).

Date	PROCEEDINGS
	—Declaration (sealed & placed in vault) (Dkt'd 12/09/91).
	Order filed ((sealed & placed vault)) (JUDGE NIELSEN) (Dkt'd 12/09/91).
01/03/92	—Ex-parte app for funds for Aero-Services (Dkt'd 01/06/92).
	Filed affidavit (Declaration of atty Glenn Warren) (Dkt'd 01/06/92).
	Order filed (ord that $140.00 be authorized to be paid to Aero-Services) (JUDGE NIELSEN) (Dkt'd 01/06/92).
01/06/92	Order filed (Ord signed by U.S. Circuit Judge Harry Pregerson re fees to be paid (sealed & placed in vault)) (Dkt'd 01/06/92).
	Order filed (Ord signed by U.S. Circuit Judge re interim payments) (Dkt'd 01/06/92).
01/13/92	—Ex-parte app for expert witness funds (sealed & placed in vault) (Dkt'd 01/21/92).
	—Filed declaration (sealed & placed in vault) (Dkt'd 01/21/92).
	Order filed ((sealed & placed in vault) re fees) (JUDGE NIELSEN) (Dkt'd 01/21/92).
	—filed declaration (sealed & placed in vault) (Dkt'd 01/21/92).
	—Filed declaration (sealed & placed in vault) (Dkt'd 01/21/92).
	Order filed (re assitance (sealed & placed in vault)) (JUDGE NIELSEN) (Dkt'd 01/21/92).
	Order filed (per ex parte app for investigative funds, denied) (JUDGE NIELSEN) (Dkt'd 01/21/92).
01/16/92	—Ex-parte app for addtl funds (Dkt'd 01/24/92).
	Filed affidavit (Declaration of atty Glenn Warren (sealed & placed in vault)) (Dkt'd 01/24/92).
	Order filed (Ord re addtl funds (sealed & placed in vault)) (Dkt'd 01/24/92).

Date	PROCEEDINGS
	Filed trial memorandum (Counts 1-8, S1-S8) (Filed by Govt) (Dkt'd 01/16/92).
01/21/92	Motion in limine filed (MOT #34) (Counts 1-8, S1-S8) (Deft's motion to strike racketeering acts 8 through 11 as irrelevant t/w memo of P's & A's in support) (Dkt'd 01/23/92).
	Motion in limine filed (MOT #35) (Counts 1-8, S1-S8) (Deft's motion to exclude evidence of drug ledgers t/w memo of P's & A's in support) (Dkt'd 01/23/92).
	Motion in limine filed (MOT #36) (Counts 1-8, S1-S8) (Deft's motion to exclude reference to deft's alleged drug use t/w memo of P's & A's in support) (Dkt'd 01/23/92).
	Motion in limine filed (MOT #37) (Counts 1-8, S1-S8) (Deft's motion to exclude testimony of Eddra McCarthy re death of Marco Guarderas t/w memo of P's & A's in support) (Dkt'd 01/23/92).
	Motion for continuance denied (MOT #33) (JUDGE NIELSEN) (Dkt'd 01/23/92).
	Motion in limine granted (MOT #37) (JUDGE NIELSEN) (Dkt'd 01/23/92)
	Motion in limine denied (MOT #34) (JUDGE NIELSEN) (Dkt'd 01/23/92)
	Motion in limine denied (MOT #36) (JUDGE NIELSEN) (Dkt'd 01/23/92)
	Motion in limine denied (MOT #35) (JUDGE NIELSEN) (Dkt'd 01/23/92)
01/22/92	Motion in limine filed (MOT #38) (Counts 1-8, S1-S8) (to exclude or limit the testimony of Guarderas family) (Dkt'd 01/23/92).
	Filed memorandum in support of motion in limine (MOT #38) (memo of P's & A's) (Dkt'd 01/23/92).
	Voire dire begins-jury (Counts 1, 2-4, 5, 6, 7, 8, S1, S2, S3, S4, S5, S6, S7, S8) (JUDGE NIELSEN) (Dkt'd 01/24/92).

Date	PROCEEDINGS
	Jury impaneled (Counts 1, 2-4, 5, 6, 7, 8, S1, S2, S3, S4, S5, S6, S7, S8) (and sworn) (JUDGE NIELSEN) (Dkt'd 01/24/92).
	Trial begins-jury (Counts 1, 2-4, 5, 6, 7, 8, S1, S2, S3, S4, S5, S6, S7, S8) (JUDGE NIELSEN) (Dkt'd 01/24/92).
	Trial held-jury (Counts 1, 2-4, 5, 6, 7, 8, S1, S2, S3, S4, S5, S6, S7, S8) (1st day, swore witness, filed exhibits) (JUDGE NIELSEN) (Dkt'd 01/24/92).
	Jury trial continued to 01/23/92 @ 9:00 AM (JUDGE NIELSEN) (Dkt'd 01/24/92).
	—ex parte request app for expert witness funds t/w decl, denied 1/16/92 by Judge Neilsen (JUDGE NIELSEN) (Dkt'd 01/27/92).
01/23/92	Trial held-jury (Count 1, 2-4, 5, 6, 7, 8, S1, S2, S3, S4, S5, S6, S7, S8) (2nd day, swore witnesses, filed exhibits) (JUDGE NIELSEN) (Dkt'd 01/24/92).
	Jury trial continued to 01/24/92 @ 9:00 AM (JUDGE NIELSEN) (Dkt'd 01/24/92).
01/24/92	—Application for ex-parte order to disclose returns and return information (Dkt'd 01/27/92).
	Order filed (Order for disclosure of returns & return information) (JUDGE NIELSEN) (Dkt'd 01/27/92).
	—(MOT #34) (Govt's response & opp to deft's motion in limine) (Dkt'd 01/27/92).
	—(MOT #35) Govt's response & opposition) (Dkt'd 01/27/92).
	—(MOT #36) (Govt's response & opposition to deft's motion) (Dkt'd 1/27/92).
	—(MOT #37) (Govt's response & opposition to deft's motion) (Dkt'd 1/27/92).
	—(MOT #38) (Govt's response & opposition to deft's motions) (Dkt'd 01/27/92).

Date	PROCEEDINGS
	Order filed (Recd order from USCA by Chief Judge Wallace re emergency motion for continuance, petition is ordered filed without prepayment of fees and hereby denied) (Dkt'd 01/27/92).
	Trial held-jury (Counts 1, 2-4, 5, 6, 7, 8, S1, S2, S3, S4, S5, S6, S7, S8) (3rd day, swore witnesses, filed exhibits) (JUDGE NIELSEN) (Dkt'd 01/27/92).
	Motion made in open court for new trial (MOT #39) (Counts 1, 2-4, 5, 6, 7, 8, S1, S2, S3, S4, S5, S6, S7, S8) (JUDGE NIELSEN) (Dkt'd 01/27/92).
	Motion for new trial denied (MOT #39) (JUDGE NIELSEN) (Dkt'd 01/27/92).
	Jury trial continued to 01/28/92 @ 9:00 AM (JUDGE NIELSEN) (Dkt'd 01/27/92).
01/27/92	Motion in limine denied (MOT #38) (JUDGE NIELSEN (Dkt'd 01/27/92).
	—(MOT #38) (Memo of P's & A's in support of motion) (Dkt'd 01/27/92).
	Filed petition for writ of habeas corpus ad testificandum (ex-parte app for writ of hc ad testificandum) (Dkt'd 01/28/92).
	Filed affidavit (Declaration of atty Glenn Stewart Warren) (Dkt'd 01/28/92).
	Order filed (that a writ be issued for writ of HC for Wayne Countryman for testimony) (JUDGE NIELSEN) (Dkt'd 01/28/92).
	Issued writ of habeas corpus ad prosequendum (CLERK) (Dkt'd 01/28/92).
01/28/92	Trial held-jury (Counts 1, 2-4, 5, 6, 7, 8, S1, S2, S3, S4, S5, S6, S7, S8) (4th day, swore witnesses, filed exhibits (JUDGE NIELSEN) (Dkt'd 01/29/92).
	Jury trial continued to 01/29/92 @ 9:00 AM (JUDGE NIELSEN) (Dkt'd 01/29/92).

Date	PROCEEDINGS
01/29/92	Trial held-jury (Counts 1, 2-4, 5, 6, 7, 8, S1, S2, S3, S4, S5, S6, S7, S8) (5th day, swore witnesses, filed exhibits) (JUDGE NIELSEN) (Dkt'd 01/30/92).
	Jury trial continued to 01/30/92 @ 1:30 PM (JUDGE NIELSEN (Dkt'd 01/30/92).
	Order filed (to unseal wiretap tapes & pen registers t/w afdt in support of order to unseal tapes & registers) (JUDGE NIELSEN) (Dkt'd 01/30/92).
	—Letter to John Trasher (sealed & placed in vault) (Dkt'd 01/30/92).
	—Letter to John Trasher (sealed & placed in vault) (Dkt'd 01/30/92).
01/30/92	Trial held-jury (Counts 1, 2-4, 5, 6, 7, 8, S1, S2, S3, S4, S5, S6, S7, S8) (sixth day, swore witness, filed exhibits) (JUDGE NIELSON) (Dkt'd 01/31/92).
	Jury trial continued to 01/31/92 @ 9:00 AM (JUDGE NIELSEN) (Dkt'd 01/31/92).
01/31/92	Trial held-jury (Counts 1, 2-4, 5, 6, 7, 8, S1, S2, S3, S4, S5, S6, S7, S8) (Seventh day, swore witnesses, filed exhibits) (JUDGE NIELSEN) (Dkt'd 02/03/92).
	Jury trial continued to 02/04/92 (JUDGE NIELSEN) (Dkt'd 02/093/92).
02/03/92	Motion in limine filed (MOT #40) (Counts 1, 2-4, 5, 6, 7, 8, S1, S2, S3, S4, S5, S6, S7, S8) (motion to permit testimony of DEA agent Al Devetko re Garcia-Countryman case) (Dkt'd 02/04/92).
	Filed memorandum in support of motion in limine (MOT #40) (memo of P's & A's) (Dkt'd 02/04/92).

Date	PROCEEDINGS
02/04/92	Motion made in open court for mistrial (MOT #41) (Counts 1, 2-4, 5, 6, 7, 8, S1, S2, S3, S4, S5, S6, S7, S8) (Deft's oral motion to exclude witness Dulong or, in the alternative for mistrial) (JUDGE NIELSEN) (Dkt'd 02/05/92).
	Motion for mistrial denied (MOT #41) (JUDGE NIELSEN) (Dkt'd 02/05/92).
	Trial held-jury (Counts 1, 2-4, 5, 6, 7, 8, S1, S2, S3, S4, S5, S6, S7, S8) (Eighth day, swore witnesses, file exhibits) (JUDGE NIELSEN) (Dkt'd 02/05/92).
	Jury trial continued to 02/05/92 @ 9:00 AM (JUDGE NIELSEN) (Dkt'd 02/05/92).
02/05/92	Trial held-jury (Counts 1, 2-4, 5, 6, 7, 8, S1, S2, S3, S4, S5, S6, S7, S8) (Ninth day, swore witnesses, filed exhibits) (JUDGE NIELSEN) (Dkt'd 02/06/92.
	Jury trial continued to 02/06/92 @ 9:00 AM (JUDGE NIELSEN) (Dkt'd 02/06/92).
02/06/92	Trial held-jury (Counts 1, 2-4, 5, 6, 7, 8, S1, S2, S3, S4, S5, S6, S7, S8) (Tenth day, swore witnesses, filed exhibits) (JUDGE NIELSEN) (Dkt'd 02/07/92).
	Motion made in open court for judgment of acquittal (MOT #42) (Count 8) (for rule 29, under submission as to ct 8) (JUDGE NIELSEN) (Dkt'd 02/07/92).
	Motion made in open court for judgment of acquittal (MOT #43) (Counts 1-7, S1-S7) (for rule 29) (JUDGE NIELSEN) (Dkt'd 02/07/92).
	Motion for judgment of acquittal denied (MOT #43) (denied as to all other counts) (JUDGE NIELSEN) (Dkt'd 02/07/92).
	Motion in limine denied (MOT #40) (JUDGE NIELSEN) (Dkt'd 02/07/92).

Date	PROCEEDINGS
	Jury trial continued to 02/07/92 @ 9:00 AM (JUDGE NIELSEN) (Dkt'd 02/07/92).
	Order filed (Ord signed by USCA Judge Harry Pregerson re assist in prep of deft's case & ord to seal (sealed & placed in vault)) (Dkt'd 02/10/92).
	Order filed (ord re interim payments signed to USCA Judge Harry Pregerson (sealed & placed in vault)) (Dkt'd 02/10/92).
	Order filed (ord signed by USCA Judge Harry Pregerson re addtl pmts be authorized (sealed & placed in vault)) (Dkt'd 02/10/92).
02/07/92	Trial held-jury (Counts 1, 2-4, 5, 6, 7, 8, S1, S2, S3, S4, S5, S6, S7, S8) (Eleventh day, jury trial) (JUDGE NIELSEN) (Dkt'd 02/10/92).
	Jury trial continued to 02/11/92 @ 9:00 AM (JUDGE NIELSEN) (Dkt'd 02/10/92).
02/11/92	Trial held-jury (Counts 1, 2-4, 5, 6, 7, 8, S1, S2, S3, S4, S5, S6, S7, S8) (Twelfth day, swore witnesses, filed exhibits) (JUDGE NIELSEN) (Dkt'd 02/12/92).
	Jury trial continued to 02/12/92 @ 9:00 AM (JUDGE NIELSEN) (Dkt'd 02/12/92).
02/12/92	Motion made in open court for mistrial (MOT #44) (Counts 1, 2-4, 5, 6, 7, 8, S1, S2, S3, S4, S5, S6, S7, S8) (JUDGE NIELSEN) (Dkt'd 02/13/92).
	Motion for mistrial denied (MOT #44) (JUDGE NIELSEN) (Dkt'd 02/13/92).
	Trial held-jury (Counts 1, 2-4, 5, 6, 7, 8, S1, S2, S3, S4, S5, S6, S7, S8) (Thirteenth day, swore witnesses, filed exhibits) (JUDGE NIELSEN) (Dkt'd 02/13/92).
	Jury trial continued to 02/13/92 @ 9:00 AM (JUDGE NIELSEN) (Dkt'd 02/13/92).

Date	PROCEEDINGS
	—(MOT #3) (memorandum & P's & A's in opposition to deft's rule 29 motion) (Dkt'd 02/13/92).
	Order filed (ord that Carol Henderson be permitted to view all sealed docs, including orders for purpose of determining what monies have been authorized under CJA to pay witnesses, experts & investigators) (JUDGE NIELSEN) (Dkt'd 02/13/92).
	Filed government's proposed jury instructions (Counts 1, 2-4, 5, 6, 7, 8, S1, S2, S3, S4, S5, S6, S7, S8) (Dkt'd 02-13/92).
02/13/92	Trial held-jury (Counts 1, 2-4, 5, 6, 7, 8, S1, S2, S3, S4, S5, S6, S7, S8) (14th day, swore witnesses, filed exhibits, closing arguments, jury retires to begin deliberations) (JUDGE NIELSEN) (Dkt'd 02/18/92).
	Jury trial continued to 02/14/92 @ 9:00 AM (JUDGE NIELSEN) (Dkt'd 02/18/92).
	Order filed (ord re reimbursement for witnesses & related expenses) (MAG McKEE) (Dkt'd 02/18/92).
02/14/92	Trial held-jury (Counts 1, 2-4, 5, 6, 7, 8, S1, S2, S3, S4, S5, S6, S7, S8) (15th day, jury sequestered for lunch) (JUDGE NIELSEN) (Dkt'd 02/18/92).
	Jury trial continued to 02/18/92 @ 9:00 AM (JUDGE NIELSEN) (Dkt'd 02/18/92).
02/18/92	Trial held-jury (Counts 1, 2-4, 5, 6, 7, 8, S1, S2, S3, S4, S5, S6, S7, S8) (JUDGE NIELSEN) (Dkt'd 02/19/92).
	Trial ends-jury (Counts 1, 2-4, 5, 6, 7, 8, S1, S2, S3, S4, S5, S6, S7, S8) (jury polled, jury retires at 3:55pm on 2/13/92 and returns at 2:50 pm on 2/18/92 jury ord meals at Gov exp while deliberating) (JUDGE NIELSEN) (Dkt'd 02/19/92).

Date	PROCEEDINGS
	Jury verdict of not guilty (Counts S5, S8) (jury polled) (Dkt'd 02/19/92).
	Jury verdict of guilty (Counts S1-S4, S6) (jury polled) (Dkt'd 02/19/92).
	Bond exonerated (deft remanded to cust) (JUDGE NIELSEN) (Dkt'd 02/19/92).
	Order cause referred to the probation department for a pre-sentence investigation (Counts S1-S4, S6) (JUDGE NIELSEN) (Dkt'd 02/19/92).
	Sentencing set for 06/01/92 @ 9:00 AM (Counts S1-4, S6) (Count 7 remains pending until 6/1/92) (JUDGE NIELSEN) (Dkt'd 02/19/92).
	Motion for judgment of acquittal mooted (MOT #42) (re count 8) (JUDGE NIELSEN) (Dkt'd 02/19/92).
	—declaration of counsel, Glenn Warren re subpoena's for Chase Bank (Dkt'd 02/02/92).
	Order filed (ord that $2315.60 be authorized for Chase Bank for compliance w/subpoena issd on behalf of deft) (JUDGE NIELSEN) (Dkt'd 03/02/92).
02/19/92	Filed judgment of discharge (Counts S5, S8) (entered 2/19/92) (JUDGE NIELSEN) (Dkt'd 02/19/92).

[Filed Oct. 17, 1991]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
May 1990 Grand Jury

Criminal Case No. 90-0925-N

UNITED STATES OF AMERICA, PLAINTIFF

v.

JUAN PAUL ROBERTSON, DEFENDANT

INDICTMENT
(Superseding)

Title 21, U.S.C., Secs. 846 and 841(a)(1)—Conspiracy to Possess a Controlled Substance with Intent to Distribute; Title 21, U.S.C., Sec. 841(a)(1)—Possession of a Controlled Substance with Intent to Distribute; Title 21, U.S.C., Sec. 843(b)—Unlawful Use of a Communication Facility; Title 18, U.S.C., Sec. 1962(a)—Racketeering Influenced Corrupt Organization; Title 18, U.S.C., Sec. 1963(a)(1), (2), and (3)—Forfeiture; Title 21, U.S.C., Sec. 848—Continuing Criminal Enterprise; Title 18, U.S.C., Sec. 2—Aiding and Abetting

The grand jury charges:

Count 1

Beginning at a date unknown to the grand jury and continuing up to and including November 5, 1987, within the Southern District of California, and elsewhere, de-

fendant JUAN PAUL ROBERTSON did knowingly and intentionally combine, conspire and agree with Dean Edward Stephens, Sandra Lynn Stephens, Phillip Duane Rushin, Edward John Studebaker, Elizabeth T. Grove, Edwin Andrew Dickson, Floyd Lee Robertson, Jose Antonio Maldonado, Eduardo Rodriguez-Bonilla and Oscar Giron, not charged herein, and with divers other persons known and unknown to the grand jury to violate the laws of the United States, to wit, to knowingly and intentionally possess with intent to distribute cocaine, a Schedule II Controlled Substance; in violation of Title 21, United States Code, Section 841(a)(1).

OVERT ACTS

In furtherance of said conspiracy and to effect the objects thereof, the following overt acts, among others, were committed within the Southern District of California, and elsewhere:

1. In or about June 1986, defendant JUAN PAUL ROBERTSON met with Jose Antonio Maldonado and discussed the processing of unrefined cocaine.

2. Several weeks after the discussion referred to in Overt Act 1, defendant JUAN PAUL ROBERTSON discussed this subject again with Jose Antonio Maldonado.

2. In or about October 1986, defendant JUAN PAUL ROBERTSON met with Jose Antonio Maldonado and Eduardo Rodriguez-Bonilla, not charged herein, and discussed the sale of several kilograms of cocaine.

3. On or about November 1, 1986, defendant JUAN PAUL ROBERTSON discussed with Dean Edward Stephens the need to obtain a

chemist capable of converting coca paste to cocaine in order to maximize drug profits.

4. On or about November 27, 1986, defendant JUAN PAUL ROBERTSON received delivery of two kilograms of cocaine from Jose Antonio Maldonado, Eduardo Rodriguez-Bonilla and Oscar Giron, at 10880 Wilshire Boulevard in Los Angeles, California.

5. On or about November 27, 1986, defendant JUAN PAUL ROBERTSON delivered two kilograms of cocaine to Dean Edward Stephens and Sandra Lynn Stephens at 10880 Wilshire Boulevard in Los Angeles, California.

6. On or about November 27, 1986, Cheryl Ledford met with Dean Edward Stephens and Sandra Lynn Stephens in Dana Point, California, and discussed the purchase and sale of large quantities of cocaine.

7. On or about December 15, 1986, Oscar Giron received partial payment from defendant JUAN PAUL ROBERTSON for two kilograms of cocaine earlier delivered to defendant JUAN PAUL ROBERTSON on or about November 27, 1986, in Los Angeles, California.

8. On or about December 19, 1986, Dean Edward Stephens obtained a multi-kilogram quantity of cocaine from defendant JUAN PAUL ROBERTSON in Los Angeles, California.

9. On or about December 21, 1986, Cheryl Ledford bought one kilogram of cocaine from Dean Edward Stephens for $25,000.

10. On or about January 1, 1987, Jose Antonio Maldonado delivered a two-ounce sample of cocaine to defendant JUAN PAUL ROBERTSON

in Los Angeles, California, as a sample of the type of cocaine which Jose Antonio Maldonado could supply to defendant JUAN PAUL ROBERTSON in the future.

11. On or about January 17, 1987, at approximately 12:27 p.m., Phillip Duane Rushin and Edward John Studebaker, discussed the sale of a kilogram quantity of cocaine.

12. On or about January 21, 1987, at approximately 8:05 a.m., Elizabeth T. Grove telephoned Dean Edward Stephens and advised him she needed what they had earlier discussed.

13. On or about January 21, 1987, defendant JUAN PAUL ROBERTSON delivered to Dean Edward Stephens, previously indicted, approximately one kilogram of cocaine in Los Angeles, California.

14. On or about January 21, 1987, Dean Edward Stephens telephoned Elizabeth T. Grove and assured her she could make her trip.

15. On or about January 21, 1987, at approximately 8:42 p.m., Elizabeth T. Grove placed a phone call to 303-923-4310.

16. On or about January 22, 1987, at approximately 7:42 a.m., Elizabeth T. Grove telephoned Edward John Studebaker and negotiated with him the price of a kilogram of cocaine and discussed her travel itinerary.

17. On or about January 22, 1987, at approximately 10:44 a.m., Elizabeth T. Grove telephoned the residence of Dean Edward Stephens and Sandra Lynn Stephens and stated she was on her way over.

18. On or about January 22, 1987, Elizabeth T. Grove, Phillip Duane Rushin, Sandra Lynn

Stephens and Dean Edward Stephens possessed approximately 1,010.8 grams of cocaine with intent to distribute.

19. On or about January 22, 1987, Elizabeth T. Grove traveled from her residence to 17204 La Brisa, Rancho Santa Fe, California, immediately prior to leaving for Grand Junction Colorado.

20. On or between January 22 and January 23, 1987, Elizabeth T. Grove traveled from California to Colorado with approximately 1,010.8 grams of cocaine with intent to distribute.

21. On or about January 23 1987, Elizabeth T. Grove left Grand Junction Colorado, en route to the residence of Edward John Studebaker to deliver one kilogram of cocaine.

22. On or about January 23, 1987, Dean Edward Stephens telephoned defendant JUAN PAUL ROBERTSON to advise defendant JUAN PAUL ROBERTSON of the arrest of cocaine runner Elizabeth T. Grove.

23. On or about January 28 1987, defendant JUAN PAUL ROBERTSON received delivery of approximately three kilograms of cocaine from Jose Antonio Maldonado and Eduardo Rodriguez-Bonilla in Los Angeles, California.

24. On or about January 28, 1987, Dean Edward Stephens purchased two kilograms of cocaine from defendant JUAN PAUL ROBERTSON in Los Angeles California.

25. On or about January 30, 1987, Dean Edward Stephens delivered 1/4 pound of cocaine to Cheryl Ledford at 17204 La Brisa, Rancho Santa Fe, California, which was part of a two-kilogram purchase earlier obtained from defendant JUAN PAUL ROBERTSON.

26. From on or about February 17, 1987, to on or about February 20, 1987, Elizabeth T. Grove, Phillip Duane Rushin, Dean Edward Stephens, Sandra Lynn Stephens, Edwin Andrew Dickson, and Floyd Lee Robertson had a series of conversations where efforts were made to recover from a financial loss by additional sales of narcotics.

27. On or about February 25 1987, defendant JUAN PAUL ROBERTSON had a telephone conversation with Dean Edward Stephens wherein defendant ROBERTSON requested payment in full for cocaine he had supplied to Dean Edward Stephens that week.

28. On or about March 1, 1987, Jose Antonio Maldonado and Eduardo Rodriguez-Bonilla met with defendant JUAN PAUL ROBERTSON in Los Angeles, California, at which time defendant JUAN PAUL ROBERTSON requested a delay in payment for cocaine earlier fronted to him (ROBERTSON), because some of "his people" in San Diego, California, had been arrested.

29. On or about March 1, 1987, defendant JUAN PAUL ROBERTSON, instructed Eduardo Rodriguez-Bonilla and Jose Antonio Maldonado to limit their cocaine transactions to five kilograms or less, to fall within Federal guidelines in the event they were arrested.

30. On or about March 4, 1987, Floyd Lee Robertson talked on the telephone with Sandra Lynn Stephens about payment for a narcotics transaction.

31. On or about March 5, 1987, defendant JUAN PAUL ROBERTSON delivered approximately

four kilograms of cocaine to Dean Edward Stephens in Los Angeles, California.

All in violation of Title 21, United States Code, Section 846.

Count 2

On or about December 21, 1986, within the Southern District of California, Dean Edward Stephens and Sandra Lynn Stephens did knowingly and intentionally distribute approximately one kilogram of cocaine, a Schedule II Controlled Substance, and defendant JUAN PAUL ROBERTSON did knowingly and intentionally aid, abet, counsel, command and procedure the commission of the aforesaid offense; in violation of Title 21, United States Code, Section 841(a)(1), and Title 18, United States Code, Section 2.

Count 3

On or about January 22, 1987, within the Southern District of California, Dean Edward Stephens, Sandra Lynn Stephens, and Elizabeth T. Grove along with Jose Antonio Maldonado and Eduardo Rodriguez-Bonilla did knowingly and intentionally possess, with intent to distribute, approximately 1,010.8 grams of cocaine, a Schedule II Controlled Substance, and defendant JUAN PAUL ROBERTSON did knowingly and intentionally aid, abet, counsel, command and procure the commission of the aforesaid offense; in violation of Title 21, United States Code, Section 841(a)(1), and Title 18, United States Code, Section 2.

Count 4

On or about January 30, 1987, within the Southern District of California, Dean Edward Stephens and Sandra Lynn Stephens did knowingly and intentionally distribute several ounces of cocaine, a Schedule II Controlled Substance, and defendant JUAN PAUL ROBERTSON did

knowingly and intentionally aid, abet, counsel, command and procure the commission of the aforesaid offense; in violation of Title 21, United States Code, Section 841 (a)(1), and Title 18, United States Code, Section 2.

Count 5

On or about February 25, 1987, within the Southern District of California, at approximately 8:38 p.m., defendant JUAN PAUL ROBERTSON did knowingly and intentionally use a communication facility, namely, a telephone, in committing and in causing and facilitating the commission of controlled substance offenses in violation of Title 21, United States Code, Sections 846 and 841 (a)(1), that is, distribution of and possession with intent to distribute a controlled substance, and conspiracy to do so; in violation of Title 21, United States Code, Section 843(b).

Count 6

I

Introduction

1. From in or about April 1985, and continuing up to and including April 1988, Double Eagle Mining Company, Circle Hot Springs, Alaska, which was a partnership formed in principle in April 1985, legally formalized on June 20, 1985, and dissolved on July 31, 1985, and Robertson Mining Company, Circle Hot Springs, Alaska, a sole proprietorship of defendant JUAN PAUL ROBERTSON, constituted an enterprise, as that term is defined in Title 18, United States Code, Section 1961(4), which was engaged in, and the activities of which affected, interstate and foreign commerce.

2. At all times material to this indictment, defendant JUAN PAUL ROBERTSON was an attorney licensed to practice law in the State of California.

3. At various times beginning in 1980 and continuing up to and including the date of this indictment, defendant JUAN PAUL ROBERTSON maintained law offices at various locations in Los Angeles and Santa Monica, California, and was engaged primarily in defending persons accused of crimes.

II

Allegations

4. From in or about April 1985, and continuing up to and including November 1987, defendant JUAN PAUL ROBERTSON, having received income derived, directly and indirectly, from a pattern of racketeering activity, as that term is defined in Title 18, United States Code, Section 1961(5), unlawfully and knowingly did, directly and indirectly, use and invest a part of such income and the proceeds derived from such income, in acquisition of and interest in, and the establishment and operation of, an enterprise which was engaged in and whose activities affected interstate and foreign commerce.

5. The pattern of racketeering activity committed by the defendant consisted of racketeering acts 1 through 5, which are acts charged in counts 1 through 5 of this indictment, and which are realleged and incorporated by reference herein, and racketeering acts 6 through 11 set forth below in subparagraphs 5(a)-5(f):

Racketeering Acts

The pattern of said racketeering activity committed by the defendant JUAN PAUL ROBERTSON consisted of multiple acts of illegal distribution of controlled substances as alleged in Counts 1 through 5 of this indictment and paragraphs 5a through 5f as enumerated below, in violation of Title 21, United States Code, Sections 841(a)(1) and 846, and Title 18, United States Code, Sections 2514 and 956.

Racketeering Act 6:

a. From on or about November 15, 1983, to on or about April 1985, within the Central District of California, the District of Arizona, and elsewhere, defendant JUAN PAUL ROBERTSON did transport in interstate commerce approximately $980,000, one 1979 Cadillac Sedan de Ville automobile, and two kilograms of cocaine, which he then and there well knew were stolen, converted and taken by fraud; in violation of Title 18, United States Code, Section 2314.

Racketeering Act 7:

b. On or about January 24, 1985, within the Central District of California and the District of Arizona, defendant JUAN PAUL ROBERTSON transported in interstate commerce from the State of California to the State of Arizona approximately 22 kilograms of cocaine and a large undetermined amount of cash in excess of $5,000, which he then and there well knew were stolen, converted and taken by fraud; in violation of Title 18, United States Code, Section 2314.

Racketeering Act 8:

c. In or about October, 1986, within the Central District of California, defendant JUAN PAUL ROBERTSON did knowingly and intentionally possess with intent to distribute approximately three kilograms of cocaine; in violation of Title 21, United States Code, Section 841 (a)(1).

Racketeering Act 9:

d. On or about March 4, 1987, within the Southern District of California, defendant JUAN PAUL ROBERTSON knowingly and intentionally distributed approximately four kilograms of cocaine, which he had obtained from Jose Antonio Maldonado and Eduardo Rodriguez,

to Dean Edward Stephens and Sandra Lynn Stephens; in violation of Title 18, United States Code, Section 841 (a)(1).

Racketeering Act 10:

e. In or about April 1987, at Los Angeles, California, within the Central District of California, defendant JUAN PAUL ROBERTSON knowingly and intentionally distributed approximately five kilograms of cocaine to Peruvian cocaine traffickers in order to effect the release from custody of one Jose Antonio Maldonado, who had been kidnapped by said Peruvian cocaine traffickers and held for ransom; in violation of Title 21, United States Code, Section 841(a)(1), and Title 18, United States Code, Section 2.

Racketeering Act 11:

f. From on or about August 12, 1987, to on or about November 2, 1987, within the Central District of California and elsewhere, defendant JUAN PAUL ROBERTSON knowingly and willfully conducted and attempted to conduct a financial transaction affecting interstate commerce, to wit, structuring a deposit of approximately $102,000 in cash, which cash, in fact, was the proceeds of a specified unlawful activity, that is, dealing in narcotics and other dangerous drugs, knowing full well that the transaction was designed in whole and in part to conceal and disguise the nature, location, source, ownership, and control of the proceeds of such specified unlawful activity and to avoid a transaction reporting requirement under federal law, to wit, Title 31, United States Code, Section 5313; and knowing further that the property, that is, approximately $102,000 in cash, involved in the financial transaction represented the proceeds of some form of unlawful activity; in violation of Title 18, United States Code, Sections 1956(a)(1)(B), and Section 2.

All in violation of Title 18, United States Code, Section 1962(a).

Count 7

Forfeitures

The grand jury further charges:

1. Paragraphs 1 through 5 of Count 6 of this indictment are repeated and realleged as if fully set forth herein for the purpose of alleging forfeitures pursuant to the provisions of Title 18, United States Code, Section 1963 (a)(1), (2), and (3).

2. Through the aforesaid pattern of racketeering activity, the defendant JUAN PAUL ROBERTSON has acquired and maintained interests in violation of Title 18, United States Code, Section 1962, which interests, wherever located and in whatever names held, are subject to forfeiture to the United States pursuant to Title 18, United States Code, Section 1963(a)(1). Such interests of defendant JUAN PAUL ROBERTSON include, but are not limited to, the following:

a. Cash in the amount of approximately $980,000, which was acquired through the racketeering activity set forth in paragraph 5a of Count 6 of this indictment;

b. One 1979 Cadillac Sedan de Ville automobile.

c. Cash in the amount of approximately $200,000, which was acquired through the racketeering activity set forth in paragraph 5f of this indictment.

3. Through the aforesaid pattern of racketeering activity, the defendant JUAN PAUL ROBERTSON has interests in, securities of, claims against, and property and contractual rights affording sources of influence over an enterprise which he established, operated, controlled, conducted, and participated in the conduct of, in violation of Title 18, United States Code, Section 1962, thereby making such interests, securities, claims, property and contractual rights, wherever located, and in whatever

names held, subject to forfeiture to the United States pursuant to Title 18, United States Code, Section 1963 (a)(2). Such interests of defendant JUAN PAUL ROBERTSON include, but are not limited to, those interests set forth in subparagraphs 2a, 2b, and 2c of these Forfeiture Allegations which are incorporated by reference.

4. The defendant JUAN PAUL ROBERTSON has property constituting and derived from proceeds which he obtained, directly and indirectly, from racketeering activity in violation of Title 18, United States Code, Section 1962, thereby making such property, or an amount of cash equivalent thereto, forfeitable to the United States pursuant to Title 18, United States Code, Section 1963 (a)(3). Such property includes, but is not limited to, those interests set forth in subparagraphs 2a, 2b, and 2c of these Forfeiture Allegations which are incorporated by reference.

All in violation of Title 18, United States Code, Section 1963.

Count 8

From in or about the month of November 1983, and continuing thereafter up to and including the date of the filing of this indictment, within the Southern District of California and elsewhere, defendant JUAN PAUL ROBERTSON did unlawfully, willfully, knowingly and intentionally engage in a Continuing Criminal Enterprise in that he did violate Title 21, United States Codes, Sections 841(a)1), 843(b), and 846, as alleged in Counts 1 through 5 and racketeering acts 8 through 10 of Count 6 of this indictment (said counts and racketeering acts being incorporated herein by reference), which violations were part of a continuing series of violations of said statutes undertaken by defendant JUAN PAUL ROBERTSON, in concert with at least five other persons, with respect to whom the defendant occupied a position of organizer, supervisor, and manager, and from which con-

tinuing series of violations the defendant obtained substantial income and resources; in violation of Title 21, United States Code, Section 848.

DATED: October 17, 1991.

A TRUE BILL:

Foreperson

WILLIAM BRANIFF
United States Attorney

By:
STEPHEN W. PETERSON
Assistant U.S. Attorney

JURY INSTRUCTIONS

[Tr. 2256-2300]

* * * *

[2256] THE COURT: Ladies and gentlemen, you are the sole judges of the facts. However, you must apply the law as I state it to you. You must not be influenced by sympathy, passion, prejudice or public opinion. You are not to single out any one instruction but must consider them as a whole. [2257] In judging the evidence, give it a reasonable and fair construction.

An indictment is only a method of accusing a defendant of a crime. It is not evidence, and you are not to infer from it that the defendant is more likely to be guilty than innocent. The law presumes a defendant to be innocent of crime. So, although accused, defendants begin the trial with a clean slate, with no evidence against them.

A defendant is presumed to be innocent until the evidence proves guilt beyond a reasonable doubt. This law applies to every element of the offenses charged.

This presumption of innocence is enough to acquit a defendant unless you, as jurors, are satisfied beyond a reasonable doubt of guilt. It is not required that the Government prove guilt beyond all possible doubt. The test is one of reasonable doubt. A reasonable doubt is a doubt based upon reason and common sense and may arise from a careful and impartial consideration of all the evidence or from lack of evidence. Proof beyond a reasonable doubt is proof that leaves you firmly convinced that the defendant is guilty.

A reasonable doubt exists when, after careful and impartial consideration of all of the evidence in the case, you as jurors do not feel convinced that a defendant is guilty of the charges. This burden of proof is always on the [2258] prosecution and never shifts to a defendant. The law never imposes upon the defendant the burden or duty of calling any witness or producing any evidence.

If there's a reasonable doubt as to a defendant's guilt, you must return a verdict of not guilty.

You are the sole judges of the credibility of the witnesses who have testified in this case, and the weight their respective testimony deserves. In determining the credibility of the witnesses, you may consider any matter in evidence that has a tendency in reason to prove or disprove the truthfulness of their testimony, including but not limited to the following: their demeanor while testifying; the manner in which they have testified; the character of their testimony; their intelligence, motive and state of mind; their ability to observe the matters as to which they have testified; the extent of or non-existence of a bias or interest; statements previously made by the witness that are consistent or inconsistent with their testimony.

Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses, may or may not cause the jury to discredit such testimony. Two or more persons witnessing an incident or a transaction may see or hear it differently. An innocent misrecollection, like failure of recollection, is not an uncommon experience. In weighing the effect of a [2259] discrepancy, always consider whether it pertains to a matter of importance or an unimportant detail, and whether the discrepancy results from innocent error or intentional falsehood.

After making your own judgment, you will give the testimony of each witness such credibility, if any, as you think it deserves. You are not bound to decide any issue of fact in accordance with the testimony of any number of witnesses which does not produce in your minds' belief in the likelihood of truth, as against the testimony of a lesser number of witnesses or other evidence which does produce such belief in your minds. The test is not which side brings the greater number of witnesses or presents the greater amount of evidence but which witness and

which evidence appeals to your minds as being most accurate and trustworthy.

The defendant has testified. You are to judge the credibility of his testimony in the same way as you would consider the testimony of any other witness. The evidence in the case consists of the sworn testimony of all witnesses, all exhibits received in evidence and all facts which have been admitted or stipulated.

When the Court has sustained an objection to a question, you must not speculate as to what the answer might have been or the reason for the objection. If any evidence was striken by the Court, such matter must be treated as [2260] though you had never heard it. Do not assume that I hold any opinion on any fact in the case. If I have made any comment as to the facts—I don't think I have, but if I have, you are at liberty to disregard any such comment, but you must follow these instructions on the law.

Any statement of the Court to an attorney is not to be considered by you in arriving at your verdict.

Evidence may be either direct or circumstantial. It is direct evidence if it proves a fact without an inference and which in itself, if true, conclusively establishes that fact. It is circumstantial evidence if it proves a fact from which an inference of the existence of another fact may be drawn.

An inference is a deduction of fact that may logically and reasonably be drawn from another fact or group of facts established by the evidence.

The law makes no distinction between direct and circumstantial evidence as to the degree of proof required; each is accepted as a reasonable method of proof and each is respected for such convincing force as it may carry.

In every crime, there must exist a union of act and intent. The burden is always upon the Government to prove both act and intent beyond a reasonable doubt.

In this case, specific intent must be proved.

A person who knowingly does an act which the law [2261] forbids, intending with bad purpose to disobey the law, may be found to act with specific intent.

While witnesses may see and hear and so be able to give direct evidence of what a defendant does, there can be no eye-witness account of the state of mind with which the acts were done. So intent may be proved by circumstantial evidence and it rarely can be established by other means.

"Unlawfully" means contrary to law. So to do an act unlawfully means to do willfully something which is contrary to law.

An act is done "willfully" if done voluntarily and intentionally, and with the intent to do something the law forbids.

An act is done "knowingly" if done voluntarily and intentionally and not because of mistake or accident or other innocent reason.

In the indictment, which I unfortunately have to read to you again, ladies and gentlemen, the grand jury charges:

Count 1. Beginning at a date unknown to the grand jury and continuing up to and including November 5, 1987, within the Southern District of California, and elsewhere, defendant Juan Paul Robertson did knowingly and intentionally combine, conspire and agree with Dean Edward Stephens, Sandra Lynn Stephens, Phillip Duane Rushin, Edward John Studebaker, [2262] Elizabeth T. Grove, Edwin Andrew Dickson, Floyd Lee Robertson, Jose Antonio Maldonado, Eduardo Rodriguez-Bonilla and Oscar Giron, not charged herein, and with diverse other persons known and unknown to the grand jury to violate the laws of the United States, to wit, to knowingly and intentionally possess with intent to distribute cocaine, a Schedule II controlled substance; in violation of Title 21, United States Code, Section 841(a)(1).

Overt Acts. In furtherance of said conspiracy and to effect the objects thereof, the following overt acts, among others, were committed within the Southern District of California, and elsewhere:

1. In or about June 1986, defendant Juan Paul Robertson met with Jose Antonio Maldonado and discussed the processing of unrefined cocaine;

2. Several weeks after the discussion referred to in Overt Act 1, defendant Juan Paul Robertson discussed this subject again with Jose Antonio Maldonado.

3. —or 2, which is again numbered 2 but is 3, in or about October 1986, defendant Juan Paul Robertson met with Jose Antonio Maldonado and Eduardo Rodriguez-Bonilla, not charged herein, and discussed the sale of several kilograms of cocaine.

Next, on or about November 1, 1986, defendant Juan Paul Robertson discussed with Dean Edward Stephens the need [2263] to obtain a chemist capable of converting coca paste to cocaine in order to maximize drug profits.

4. On or about November 27, 1986, defendant Juan Paul Robertson received delivery of two kilograms of cocaine from Jose Antonio Maldonado, Eduardo Rodriguez-Bonilla and Oscar Giron, at 10880 Wilshire Boulevard in Los Angeles, California.

5. On or about November 27, 1986, defendant Juan Paul Robertson delivered two kilograms of cocaine to Dean Edward Stephens and Sandra Lynn Stephens at 10880 Wilshire Boulevard in Los Angeles, California.

6. On or about November 27, 1986, Cheryl Ledford met with Dean Edward Stephens and Sandra Lynn Stephens, in Dana Point, California, and discussed the purchase and sale of large quantities of cocaine.

7. On or about December 15, 1986, Oscar Giron received partial payment from defendant Juan Paul Robertson for two kilograms of cocaine he earlier delivered to defendant Juan Paul Robertson on or about November 27, 1986, in Los Angeles, California.

8. On or about December 19, 1986, Dean Edward Stephens obtained a multi-kilogram quantity of cocaine from defendant Juan Paul Robertson in Los Angeles, California.

9. On or about December 21, 1966, Cheryl Ledford bought one kilogram of cocaine from Dean Edward Stephens for [2264] $25,000.

10. On or about January 1, 1987, Jose Antonio Maldonado delivered a two-ounce sample of cocaine to defendant Juan Paul Robertson in Los Angeles, California, as a sample of the type of cocaine which Jose Antonio Maldonado could supply to defendant Juan Paul Robertson in the future.

11. On or about January 17, 1987, at approximately 12:27 p.m., Phillip Duane Rushin and Edward John Studebaker discussed the sale of a kilogram quantity of cocaine.

12. On or about January 21, 1987, at approximately 8:05 a.m., Elizabeth T. Grove telephoned Dean Edward Stephens and advised him she needed what they had earlier discussed.

13. On or about January 21, 1987, defendant Juan Paul Robertson delivered to Dean Edward Stephens, previously indicted, approximately one kilogram of cocaine in Los Angeles, California.

14. On or about January 21, 1987, Dean Edward Stephens telephone Elizabeth T. Grove and assured her she could make her trip.

15. On or about January 21, 1987, at approximately 8:42 p.m., Elizabeth T. Grove placed a phone call to 303-923-4310.

16. On or about January 22, 1987, at approximately 7:42 a.m., Elizabeth T. Grove telephoned Edward John Studebaker and negotiated with him the price of a kilogram of [2265] cocaine and discussed her travel itinerary.

17. On or about January 22, 1987, at approximately 10.44 a.m., Elizabeth T. Grove telephoned the residence

of Dean Edward Stephens and Sandra Lynn Stephens and stated she was on her way over.

18. On or about January 22, 1987, Elizabeth T. Grove, Phillip Duane Rushin, Sandra Lynn Stephens and Dean Edward Stephens possessed approximately 1,010.8 grams of cocaine with intent to distribute.

19. On or about January 22, 1987, Elizabeth T. Grove traveled from her residence to 17204 La Brisa, Rancho Santa Fe, California, immediately prior to leaving for Grand Junction, Colorado.

20. On or between January 22 and January 23, 1987, he Elizabeth T. Grove traveled from California to Colorado with approximately 1,010.8 grams of cocaine with intent to distribute.

21. On or about January 23, 1987, Elizabeth T. Grove left Grand Junction, Colorado, en route to the residence of Edward John Studebaker to deliver one kilogram of cocaine.

22. On or about January 23, 1987, Dean Edward Stephens telephoned defendant Juan Paul Robertson to advise defendant Juan Paul Robertson of the arrest of cocaine runner Elizabeth T. Grove.

[2266] 23. On or about January 28, 1987, defendant Juan Paul Robertson received delivery of approximately three kilograms of cocaine from Jose Antonio Maldonado and Eduardo Rodriguez-Bonilla in Los Angeles, California.

24. On or about January 28, 1987, Dean Edward Stephens purchased two kilograms of cocaine from defendant Juan Paul Robertson in Los Angeles, California.

25. On or about January 30, 1987, Dean Edward Stephens delivered ¼ pound of cocaine to Cheryl Ledford at 17204 La Brisa, Rancho Santa Fe, California, which was part of the two-kilogram purchase earlier obtained from defendant Juan Paul Robertson.

26. On or about February 17, 1987, to on or about February 20, 1987, Elizabeth T. Grove, Phillip Duane Rushin, Dean Edward Stephens, Sandra Lynn Stephens,

Edwin Andrew Dickson, and Floyd Lee Robinson had a series of conversations where efforts were made to recover from a financial loss by additional sales of narcotics.

27. On or about February 25, 1987, defendant Juan Paul Robertson had a telephone conversation with Dean Edward Stephens wherein defendant Robertson requested payment in full for cocaine he had supplied to Dean Edward Stephens that week.

28. On or about March 1, 1987, Jose Antonio Maldonado and Eduardo Rodriguez-Bonilla met with defendant [2267] Juan Paul Robertson in Los Angeles, California, at which time defendant Juan Paul Robertson requested a delay in payment for cocaine earlier fronted to him (Robertson), because some of "his people" in San Diego, California, had been arrested.

29. On or about March 1, 1987, Defendant Juan Paul Robertson instructed Eduardo Rodriguez-Bonilla and Jose Antonio Maldonado to limit their cocaine transactions to five kilograms or less, to fall within Federal guidelines in the event they were arrested.

30. On or about March 4, 1987, Floyd Lee Robertson talked on the telephone with Sandra Lynn Stephens about payment for a narcotics transaction.

31. On or about March 5, 1987, defendant Juan Paul Robertson delivered approximately four kilograms of cocaine to Dean Edward Stephens in Los Angeles, California.

All in violation of Title 21, United States Code, Section 846.

Count 2. On or about December 21, 1986, within the southern district of California, Dean Edward Stephens and Sandra Lynn Stephens did knowingly and intentionally distribute approximately one kilogram of cocaine, a schedule II controlled substance, and defendant Juan Paul Robertson did knowingly and intentionally aid, abet, counsel, command and procure the commission of the aforesaid offense; in violation of Title 21, United States Code, Section 841(A)(1), [2268] and Title 18, United States Code, Section 2.

Count 3. On or about January 22, 1987, within the southern district of California, Dean Edward Stephens, Sandra Lynn Stephens and Elizabeth T. Grove, along with Jose Antonio Maldonado and Eduardo Rodriguez-Bonilla did knowingly and intentionally possess, with intent to distribute, approximatey 1,010.8 grams of cocaine, a schedule II controlled substance, and defendant Juan Paul Robertson did knowingly and intentionally aid, abet, counsel, command and procure the commission of the aforesaid offense; in violation of Title 21, United States Code, Section 841(A)(1), and Title 18, United States Code, Section 2.

Count 4. On or about January 30, 1987, within the southern district of California, Dean Edward Stephens and Sandra Lynn Stephens did knowingly and intentionally distribute several ounces of cocaine, a schedule II controlled substance, and defendant Juan Paul Robertson did knowingly and intentionally aid, abet, counsel, command and procure the commission of the aforesaid offense; in violation of Title 21, United States Code, Section 841(A)(1), and Title 18, United States Code, Section 2.

Count 5. On or about February 25, 1987, within the southern district of California, at approximately 8:38 p.m., defendant Juan Paul Robertson did knowingly and intentionally use a communication facility, namely, a telephone, in [2269] committing and in causing and facilitating the commission of controlled substance offenses in violation of Title 21, United States Code, Sections 846 and 841(A)(1), that is, distribution of and possession with intent to distribute a controlled substance, and conspiracy to do so; in violation of Title 21, United States Code, Section 843(B).

Count 6. Introduction. 1. From in or about April 1985, and continuing up to and including April 1988, Double Eagle Mining Company, Circle Hot Springs,

Alaska, which was a partnership formed in principle in April 1985, legally formalized on June 20, 1985, and dissolved on July 31, 1985, and Robertson Mining Company, Circle Hot Springs, Alaska, a sole proprietorship of defendant Juan Paul Robertson, constituted an enterprise, as that term is defined in Title 18, United States Code, Section 1961(4), which was engaged in, and the activities of which affected, interstate and foreign commerce.

2. At all times material to this indictment, defendant Juan Paul Robertson was an attorney licensed to practice law in the State of California.

3. At various times beginning in 1980 and continuing up to and including the date of this indictment, defendant Juan Paul Robertson maintained law offices at various locations in Los Angeles and Santa Monica, California, and was engaged primarily in defending persons [2270] accused of crime.

Allegations. 4. From in or about April 1985, and continuing up to and including November 1987, defendant Juan Paul Robertson, having received income derived, directly and indirectly, from a pattern of racketeering activity, as that term is defined in Title 18, United States Code, Section 1986(5), unlawfully and knowingly did, directly and indirectly, use and invest a part of such income and the proceeds derived from such income, in acquisition of and interest in, and the establishment and operation of, an enterprise was engaged in and whose activities affected interstate and foreign commerce.

5. The pattern of racketeering activity committed by the defendant consisted of racketeering acts 1 through 5, which are acts charged in counts 1 through 5 of this indictment, and which are realleged and incorporated by reference herein, and racketeering acts 6 through 11 set forth below in subparagraphs 5(A) through 5(F):

Racketeering acts. The pattern of said racketeering activity committed by the defendant Juan Paul Robertson consisted of multiple acts of illegal distribution of con-

trolled substances as alleged in counts 1 through 5 of this indictment and paragraphs 5A through 5F as enumerated below, in violation of Title 21, United States Code, Sections 841(A)(1) and 846, and Title 18, United States Code, Sections [2271] 2514 and 956.

Racketeering Act 6: From on or about November 15, 1983, to on or about April 1985, within the central district of California, the district of Arizona, and elsewhere, defendant Juan Paul Robertson did transport in interstate commerce approximately $980,000, one 1979 Cadillac Sedan De Ville automobile, and two kilograms of cocaine, which he then and there well knew were stolen, converted and taken by fraud; in violation of Title 18, United States Code, Section 2314.

Racketeering Act 7: On or about January 24, 1985, within the central district of California and the district of Arizona, defendant Juan Paul Robertson transported in interstate commerce from the State of California to the State of Arizona approximately 22 kilograms of cocaine and a large undetermined amount of cash in excess of $5,000, which he then and there well knew were stolen, converted and taken by fraud; in violation of Title 18, United States Code, Section 2314.

Racketeering Act 8: C. In or about October 1986, within the central district of California, defendant Juan Paul Robertson did knowingly and intentionally possess with intent to distribute approximately three kilograms of cocaine; in violation of Title 21 United States Code, Section 841(A)(1).

[2272] Racketeering Act 9: D. On or about March 4, 1987, within the southern district of California, defendant Juan Paul Robertson knowingly and intentionally distributed approximately four kilograms of cocaine, which he had obtained from Jose Antonio Maldonado and Eduardo Rodriguez, to Dean Edward Stephens and Sandra Lynn Stephens; in violation of Title 18, United States Code, Section 841(A)(1).

Racketeering Act 10: E. In or about April 1987, at Los Angeles, California, within the central district of California, defendant Juan Paul Robertson knowingly and intentionally distributed approximately five kilograms of cocaine to Peruvian cocaine traffickers in order to effect the release from custody of one Jose Antonio Maldonado, who had been kidnapped by said Peruvian cocaine traffickers and held for ransom; in violation of Title 21, Uinted States Code, Section 841(A)(1), and Title 18, United States Code, Section 2.

Racketeering Act 11: F. From on or about August 12, 1987, to on or about November 2, 1987, within the central district of California and elsewhere, defendant Juan Paul Robertson knowingly and willfully conducted and attempted to conduct a financial transaction affecting interstate commerce, to wit, structuring a deposit of approximately $102,000 in cash, which cash, in fact, was the proceeds of a specified unlawful activity, that is, dealing in narcotics [2273] and other dangerous drugs, knowing full well that the transaction was designed in whole and in part to conceal and disguise the nature, location, source, ownership and control of the proceeds of such specified unlawtul activity and to avoid a transaction reporting requirement under federal law to wit, Title 31, United States Code, Section 5313; and knowing further that the property, that is, approximately $102,000 in cash, involved in the financial transaction represented the proceeds of some form of unlawful activity; in violation of Title 18, United States Code, Sections 1956(A)(1)(2), and Section 2.

All in violation of Title 18, United States Code, Section 1962(A).

Count 8. From in or about the month of November 1983, and continuing thereafter up to and including the date of the filing of this indictment, which incidentally was October 17, 1991, within the southern district of California and elsewhere, defendant Juan Paul Robertson

did unlawfully, willfully, and knowingly and intentionally engage in a continuing criminal enterprise in that he did violate Title 21, United States Code, Section 841(A)(1), 843(B) and 846, as alleged in counts 1 through 5 and Racketeering Acts 8 through 10 of count 6 of this indictment (said counts and Racketeering Acts being incorporated herein by reference), which violations were part of a continuing series of [2274] violations of said statutes undertaken by defendant Juan Paul Robertson, in concert with at least five other persons, with respect to whom the defendant occupied a position of organizer, supervisor, and manager, and from which continuing series of violations the defendant obtained substantial income and resources; in violation of Title 21, United States Code, Section 848.

Dated October 17, 1991.

And I think we will take a 15-minute recess at this time ladies and gentlemen, while I rest my voice. Please remember my admonitions. We will be in recess for 15 minutes.

(Recess)

THE COURT: You are not late, Ms. Landes. I just got here. The court finds the jurors all present, together with the defendant and counsel.

A conspiracy is a kind of criminal partnership, an agreement of two or more persons to commit one or more crimes. The crime is the agreement to do something unlawful. It does not matter whether the crime agreed upon was committed.

For a conspiracy to have existed, it is not necessary that the conspirators made a formal agreement or that they agreed on every detail of the conspiracy. It is not enough, however, that they simply met, discussed matters [2275] of common interest, acted in similar ways or perhaps helped one another. You must find that there was a plan to commit at least one of the objects of the conspiracy.

One becomes a member of a conspiracy by willfully participating in the unlawful plan with the intent to advance or further some object or purpose of the conspiracy, even though the person does not have full knowledge of all the details of the conspiracy. Furthermore, one who willfully joins an existing conspiracy is charged with the same responsibility as if that person had been one of the originators of it. On the other hand one who has no knowledge of the conspiracy but happens to act in a way which furthers some object or purpose of the conspiracy does not thereby become a conspirator. Similarly, a person does not become a member merely by associating with one or more persons who are conspirators, nor merely by knowing of the existence of a conspiracy.

An overt act does not itself have to be unlawful. A unlawful act may be an element of a conspiracy if it was done for the purpose of carrying out the conspiracy. The Government is not required to prove that the defendant personally did one of the overt acts. Once you have decided that the defendant was a member of a conspiracy, the defendant is responsible for what other conspirators said or did to carry out the conspiracy, whether or not the defendant [2776] knew what they said or did.

You will note that the indictment charges that the alleged conspiracy began at a time unknown to the grand jury and continuing up to and including November 2, 1987. The evidence in this case need not establish the exact time during which the alleged conspiracy existed. It is sufficient if the evidence in the case shows beyond a reasonable doubt that the offense charged was committed on dates, or during times, reasonably near the dates and times alleged in the indictment.

You must decide whether the conspiracy charged in the indictment existed and, if it did, who at least some of its members were. If you find that the conspiracy charged did not exist, then you must return a not guilty verdict, even though you may find that some other con-

spiracy existed. Similarly, if you find that the defendant was not a member of the charged conspiracy, then you must find the defendant not guilty, even though the defendant may have been a member of some other conspiracy.

Section 841(A)(1) of Title 21 of the United States Code provides, in part, that it shall be unlawful for any person knowingly or intentionally to possess cocaine with the intent to distribute, or to distribute cocaine, a controlled substance.

Count 2 of the indictment charges that on or about [2277] the 21st of December, 1986, in the Southern District of California, defendant Juan Paul Robertson knowingly and intentionally distributed approximately one kilogram of cocaine, a controlled substance.

Count 3 of the indictment charges that on or about the 22nd day of January, 1987, in the Southern District of California, defendant Juan Paul Robertson knowingly and intentionally possessed approximately 1,010.8 grams of cocaine, a controlled substance, with intent to distribute.

Count 4 of the indictment charges that on or about the 30th day of January 1987, in the Southern District of California, defendant Juan Paul Robertson knowingly and intentionally distributed approximately several ounces of cocaine, a controlled substance.

In order to sustain its burden of proof for the crime of distribution of a controlled substance, as charged in counts 2 and 4 of the indictment, the Government must prove the following beyond a reasonable doubt: first, the defendant knowingly and intentionally distributed the controlled substance described in the indictment and, second, at the time of such distribution, the defendant knew that the substance distributed was cocaine, a controlled substance.

In count 3, the defendant is charged with possession of cocaine with the intent to deliver it. In order to find the

defendant guilty of that charge, the [2278] government must prove that the defendant knowingly possessed cocaine and that he possessed it with the intent to deliver it to another person.

The term "to possess" means to exercise control or authority over something at a given time. There are several types of possession: actual and joint. The "possession" is considered to be actual possession when a person knowingly has direct physical control or authority over something. The "possession" is called constructive possession when a person does not have direct physical control over something but can knowingly control it and intends to control it, sometimes through another person.

The "possession" may be knowingly exercised by one person exclusively which is called sole possession, or the "possession" may be knowingly exercised jointly when it is shared by two or more persons.

You are instructed as a matter of law that cocaine is a controlled substance.

The evidence received in this case need not prove the actual amount of the controlled substance that was part of the alleged transaction or the exact amount of the controlled substance alleged in the indictment as distributed or possessed with the intent to distribute.

The Government must prove beyond a reasonable doubt, however, that a measurable amount of the controlled [2279] substance was, in fact, knowingly and intentionally distributed or possessed with the intent to distribute by the defendant.

A defendant may be found guilty of a crime even if the person—let me start over.

A person may be found guilty of a crime even if the defendant personally did not commit the act or acts constituting the crime but aided and abetted in its commission. To prove a defendant guilty of aiding and abetting, the Government must prove beyond a reasonable doubt:

First, the crime was committed;

Second, the defendant knowingly and intentionally aided, counseled, commanded, induced, or procured others to commit the crime; and

Third, the defendant acted before the crime was completed.

It is not enough that the defendant merely associated with another or was present at the scene of the crime or unknowingly or unintentionally did things that were helpful to the principal,

The evidence must show beyond a reasonable doubt that the defendant acted with the knowledge and intention of helping others commit the crime.

The Government is not required to prove precisely [2280] which defendant actually commited the crime and which person aided and abetted.

The defendant is charged in count 5 of the indictment with illegal use of a communication facility in violation of Section 843(B) of Title 21 of the United States Code. In order for the defendant to be found guilty of that charge, the Government must prove beyond a reasonable doubt that the defendant used a telephone to help bring about the conspiracy to distribute cocaine charged in count 1 of the indictment.

You have heard testimony from witnesses who have received immunity. That testimony was given in exchange for a promise by the Government that the witness will not be prosecuted or that their testimony will not be used in any case against them.

In evaluating their testimony, you should consider whether the testimony may have been influenced by the Government's promise of immunity given in exchange for it and you should consider that testimony with greater caution than that of ordinary witnesses.

Some witnesses have pleaded guilty to a crime arising out of the same events for which the defendant is on trial. Their guilty pleas are not evidence against the defendant, and you may consider that only in deter-

mining the believability of those witnesses. You should consider the [2281] testimony of those witnesses with great caution, giving it the weight that you feel it deserves.

You have heard recordings of various conversations. These conversations were legally recorded by the Government; they are a proper form of evidence for this trial, and you may consider them just like any other evidence.

You have heard testimony from persons described as experts, or person described as an expert anyway. Persons who, by education and experience, have become expert in some field may state their opinion on matters in that field and may also state their reasons for the opinion.

Expert opinion testimony should be judged just like any other testimony. You may accept it or reject it and give it as much weight as you think it deserves, considering the witness' education and experience, and reasons given for the opinion, and all the other evidence in the case.

Count 6 of the indictment charges the defendant with violating Section 1962(A) of Title 18 of the United States Code. That section, in pertinent part, provides:

It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity to use or invest, directly or indirectly, any part of such income in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in or the activities of which [2282] affect, interstate or foreign commerce.

In order to establish the charge in count 6 of the indictment, four essential elements must be established beyond a reasonable doubt:

First, that an enterprise existed;

Second, that the defendant received income which he knew to be derived from a pattern of racketeering activity;

Third, that the defendant used that income so derived in the acquisition of an interest in or in the establishment or operation of an enterprise;

Fourth, that the enterprise was engaged in interstate commerce or that its activities affected interstate or foreign commerce.

The word "racketeering" has certain implications in our society. Use of that term in this statute and in this courtroom should not be regarded as having anything to do with your determination of whether the guilt of this defendant has been proven. The term is only a term used by Congress to describe the statute.

As I have just explained, the first element that the Government must prove is that an enterprise existed, which was engaged in or had an affect upon interstate commerce.

An enterprise includes a partnership which is associated together for a common purpose of engaging in a [2283] course of conduct. This partnership, in addition to having a common purpose, must have an ongoing organization, either formal or informal, and it must have personnel who function as a unit. This group may be organized for a legitimate and lawful purpose, or it may be organized for an unlawful purpose.

The Government has charged in the indictment as constituting the enterprise, the partnership in the mine and the sole proprietorship characterized by a common purpose, an ongoing formal or informal organization, by individuals who functioned as a continuing unit. If you so find, then you may find that an enterprise existed.

In order to prove a pattern of racketeering activity, it is not sufficient for the government to prove only that the defendant committed two of the racketeering acts as I have just described. A series of disconnected acts does not constitute a pattern, and a series of disconnected crimes does not constitute a pattern of racketeering activity.

In order to prove a pattern of racketeering activity, the government must prove beyond a reasonable doubt that at least two of the charged racketeering acts were

connected by a common scheme, plan or motive, and that at least two of the charged racketeering acts were committed within ten years of each other and that at least one of those [2284] acts occurred after October 12, 1984.

The second element of the offense is that the defendant derived income from a pattern of racketeering activity. This means that you must find that the government has proved beyond a reasonable doubt that the defendant obtained income through the commission of at least two racketeering acts. The Government has charged the defendant with committing the racketeering acts of interstate transportation of stolen property, with conspiracy to possess cocaine with the intent to distribute, possession of cocaine with the intent to distribute, distribution of cocaine, use of a communication facility in furtherance of a narcotic felony, and aiding and abetting, the predicate acts contined in count 6.

In order to establish a pattern of racketeering activity as alleged in that count, the Government must prove beyond a reasonable doubt that:

One, at least two acts of racketeering as detailed in the indictment were committed within ten years of each other;

Two, the racketeering acts have the same or similar purposes, results, participants, victim or methods of commission or are otherwise interrelated by distinguishing characteristics and are not isolated events;

Three, the racketeering acts themselves constitute [2285] a threat of continued activity. This threat of continued activity may be established when the evidence shows that the racketeering acts are part of a long-term association that exists for criminal purposes or when the racketeering acts are shown to be a regular way of conducting a defendant's ongoing legitimate business or enterprise.

The defendant is charged in racketeering act 6 of count 6 of the indictment with transportation of stolen property, approximately $980,000 cash, a 1979 Cadillac De Ville

and two kilos of cocaine; in violation of Section 2314 of Title 18 of the United States Code.

Racketeering act 7 of count 6 of the indictment charges that on or about the 25th day of January, 1985, in the Southern District of California, the defendant transported stolen goods, that is, approximately 22 kilos of cocaine, and an undetermined amount of cash, over $5,000 in interstate commerce, knowing that those goods were stolen.

In order to sustain its burden of proof for the crime of transporting stolen goods in interstate commerce as charged in racketeering acts 6 and 7 of count 6, the Government must prove the following four essential elements beyond a reasonable doubt:

One, the property described in the indictment was stolen;

Two, the stolen property has a value of at least [2286] $5,000;

Three, after the property was stolen, the defendant transported it or caused it to be transported from one State to another State; and

Four, at the time the defendant transported the property or caused the property to be transported, the defendant knew it had been stolen.

The term "stolen" means acquired or kept dishonestly and includes any form of taking from another without that person's consent, with the intention of depriving that person of the rights and benefits of possession or ownership, permanently or temporarily.

The phrase "interstate commerce" means trade or travel from one State to another.

The phrase "transports in interstate commerce" means to move from one State to another.

The term "value" means the price, par value, or market value, whichever is the highest, and the aggregate or total value of all the goods and merchandise.

Possession of property recently stolen, if not satisfactorily explained, is a circumstance from which a jury may

infer that the person in possession of it not only knew that the property was stolen but also participated in the theft in some way.

The term "recently" is a relative one and has no [2287] fixed meaning. Whether property may be considered as recently stolen depends upon the nature of the property and all of the other evidence received in the case.

It is solely for the jury to determine what inferences, if any, should be drawn from the evidence received in this case.

Section 2314 of Title 18 of the United States Code provides, in part, that whoever transports in interstate commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, shall be guilty of an offense against the United States.

The crimes of interstate transportation of stolen property, conspiracy to possess cocaine with the intent to distribute, distribution of cocaine, possession of cocaine with the intent to distribute, use of a communication facility or a telephone, and structuring a financial transaction charged in count 6 of the indictment are racketeering acts. If you find the defendant guilty of at least two of the crimes charged in count 6, you must then decide whether those acts form a pattern of racketeering activity.

A pattern of racketeering activity is at least two racketeering acts that have a relationship to each other, plus a threat of continuity. Conduct forms a pattern if it [2288] consists of criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated.

To prove the charge in racketeering act 11 that a violation of Title 18, United States Code, Section 1956, sub 1, was committed, the prosecution must establish beyond a reasonable doubt each of the following:

That the defendant conducted or caused another to conduct a financial transaction involving property constituting the proceeds of the felonious importation and/or selling of narcotics and other dangerous drugs, punishable by any law of the United States;

Second, that the defendant knew that the property involved in the financial transaction was the proceeds of some form of unlawful activity, meaning a felonious activity under State or Federal law; and

Third, that the defendant knew that the transaction was designed in whole or in part, either to conceal or disguise the nature, location, source, ownership, or control of the proceeds of unlawful activity or to avoid a transaction reporting requirement under State or Federal law.

The first element of the Section 1956(A)(1) offense that the government alleges was a racketeering act is that Mr. Robertson conducted or caused another to conduct a [2289] financial transaction involving property constituting the proceeds of the felonious selling of narcotics and other dangerous drugs punishable under any law of the United States. Some of those terms require definition.

The first element of this money laundering offense is that the defendant conducted a financial transaction involving property constituting the proceeds of narcotic distribution, punishable under Title 21, United States Code, Section 841(A)(1).

The term "conducts" means initiating, concluding, or participating in initiating or concluding a transaction.

The term "transaction" includes a purchase, sale, loan, pledge, gift, transfer, delivery or other disposition, and with respect to a financial institution includes a deposit, withdrawal, transfer between accounts, exchange of currency, loan, extension of credit, purchase or sale of any stock, bond, certificate of deposit, or other monetary instrument, or any other payment, transfer, or delivery by, through, or to a financial institution by whatever means effected.

For purpose of the currency reporting laws, the term "financial institution" means any agent, agency, branch, or office within the United States of a bank, a broker or dealer in securities, a currency dealer or exchanger, or a licensed transmitter of funds.

[2290] The term "financial transaction" means a transaction involving the movement of funds by wire or other means or involving one or more monetary instruments, which in any way or degree affects interstate or foreign commerce, or a transaction involving the use of a financial institution which is engaged in, or the activities of which affect, interstate or foreign commerce in any way or degree.

The second element of the Section 1956(A)(1) offense that the government alleges was an object of the conspiracy is that the defendant knew that the money involved in the financial transaction was the proceeds of some form of unlawful activity; that is, activity that is a felony under State or Federal law.

To satisfy that element, the government must prove beyond a reasonable doubt that Mr. Robertson knew the money involved in the transaction represented proceeds of the selling of narcotics and other dangerous drugs.

The third element of the Section 1956(A)(1) offense that the government alleges is an object of the conspiracy is that the defendant either knew that the trasaction was designed in whole or in part to conceal or disguise the nature, location, source, ownership, or control of the proceeds of the importation or selling of narcotics and other dangerous drugs, or knew that the transaction was designed in whole or in part to avoid a transaction reporting requirement [2291] under state or federal law.

You may find interstate commerce within the meaning of these instructions if you find beyond a reasonable doubt that the financial institutions involved were formed for the purpose of doing business both within and without the states in which they exist, or that the activities of the

financial institutions have an effect, however small, on interstate or foreign commerce.

Title 31, United States Code, Section 5313 and regulations promulgated under it require domestic financial institutions to file currency transaction reports with the Secretary of the Treasury whenever there is a deposit, withdrawal, exchange of currency or other payment or transfer by, through, or to such financial institution of more than $10,000 cash.

Structuring a transaction could also be defined as designing a transaction for the purpose of evading the currency reporting requirements. Thus, a person structures a transaction if he designs the transaction so that it is completed through a series of other transactions at one or more financial institutions. The transaction or transactions need not exceed the $10,000 reporting threshold at any single financial institution on any single day in order to constitute structuring within the meaning of this definition.

Count 8 of the indictment charges that beginning on [2292] or about the month of November, 1983, until on or about the date of the filing of this indictment, in the southern district of California, and elsewhere, defendant committed a violation of certain narcotics laws as part of a continuing series of such violations and that, further, this series was done in some type of arrangement or agreement with at least five other persons who were managed or supervised or organized by this defendant, and that from this continuing series of narcotic violations the defendant received substantial income.

Section 848(A) of Title 21 of the United States Code provides, in part, that any person who engages in a continuing criminal enterprise shall be guilty of an offense. 842(C) provides that a person is engaged in a continuing criminal enterprise if, one, he violates any provision of this subchapter or subchapter II of this chapter, the punishment for which is a felony, and such violation is a part of a continuing series of violations of this subchapter

or subchapter II of this chapter, all of which refer to narcotics violations, and which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position as organizer, a supervisory position, or any other position of management and from which such person obtains substantial income or resources.

[2293] In order to sustain its burden of proof for the crime of operating a continuing criminal enterprise as charged in count 8 of the indictment, the Government must prove the following five essential elements beyond a reasonable doubt:

One, defendant committed a felony violation of the federal narcotics laws;

Two, such violation was part of a continuing series of related violations of the federal narcotics laws;

Three, the continuing series of violations was undertaken by defendant Robertson in association or concert with five or more other persons;

Fourth, defendant Robertson was the organizer of these five or more other persons or occupied a management or supervisory position with respect to these five or more other persons; and

Five, defendant Robertson obtained substantial income or resources from the continuing series of narcotics violations.

The phrase "felony violation of the federal narcotics laws" as used in these instructions means the commission of any act specifically prohibited by certain sections of the United States Code for which the defendant could be imprisoned for more than one year.

The possession of cocaine with the intent to [2294] distribute and the distribution of cocaine, and the conspiracy to do so, are all felony violations of the narcotics laws.

The phrase "in concert with five or more other persons" means some type of agreement or joint action, whether

direct or indirect, with at least five other persons who were involved in a continuing series of narcotic violations.

The phrase "in concert with five or more other persons" does not require proof from the Government that the five or more other persons actually had contact with each other or knew each other or committed each violation together or operated together continuously at the same time. The Government is not required to prove that the defendant managed supervised, or organized these five or more persons at the same time.

The Government must prove beyond a reasonable doubt, however, that the defendant and at least five or more other persons were part of an agreement or joint action to commit the continuing series of violations of the federal narcotics laws alleged in count 8 of the indictment.

The term "organizer" and the terms "supervisory position" and "position of management" are to be given their usual and ordinary meanings. These words imply the exercise of power or authority by a person who occupies some position [2295] of management or supervision. This person need not be the sole or only organizer, supervisor, or manager of the activities or persons in question.

In order to find that the defendant was an organizer or one who occupied a supervisory position or other position of management, the Government must prove beyond a reasonable doubt that the defendant exercised some degree of responsibility and control over each of the five persons he is charged with having organized, managed or supervised. This person need not be the sole or only organizer, supervisor, or manager of the activities or persons in question. However, those persons who he organized, managed or supervised cannot include those who were merely his suppliers. Furthermore, you jurors must unanimously agree as to the identity of each of the five persons the defendant organized, managed or supervised.

The phrase "obtained substantial income or resources" should also be given its usual and ordinary meaning. The statute requires proof that the income or resources obtained from the activity must be significant, not trivial. It is not limited to profit but includes gross income or gross receipts. Substantial income or resources may include property or money and other things of value, such as controlled substances, which are actually received by the defendant.

[2296] The defendant is not on trial for any act or conduct not alleged in the indictment.

You are to determine only the guilt or innocence of the defendant. You are not called upon to determine the guilt or innocence of any other person.

As you have noted, a separate crime is charged in each count of the indictment. Each offense and the evidence applying to it should be considered separately. The fact that you may find the defendant guilty or not guilty as to one of the offenses charged should not control your verdict as to any other offense charged.

Punishment is a matter exclusively within the province of the court and should not be considered by you.

There is nothing peculiarly different in the way a jury is to consider the proof in a criminal case from that in which all reasonable persons treat any question arising in the most important of their own affairs, depending upon evidence presented to them.

You are expected to use your good senses, consider the evidence for only those purposes for which it has been admitted and give it a reasonable and fair consideration in the light of your common knowledge of the natural tendencies and inclinations of human beings.

If the accused be proven guilty beyond a reasonable doubt, say so. If not proved guilty beyond a reasonable [2297] doubt, say so.

The verdict must represent the considered judgment of each juror. In other words, it must be unanimous.

It is your duty to consult with one another with a view of reaching a verdict in this case, if you can do so without violence to your individual judgment.

In the course of your deliberations, don't hesitate to re-examine your own views and change your opinion if convinced that it is wrong. However you should not be influenced to decide any question in a particular way because a majority of the jurors, or any of them, favor such a decision.

Remember at all times that you are not partisans. You are judges, the judges of the facts.

Your sole interest is to seek the truth from the evidence in the case. When you have determined the truth, justice will be done, regardless of whether the verdict be guilty or not guilty.

Upon retiring to the jury room, you will select one of your number to act as your foreperson, who will preside over your deliberations and be your spokesperson in court.

A form of verdict has been prepared for your convenience. You will take this form to the jury room and when you've reached a unanimous agreement as to your verdict, you will have your foreperson fill in, date and sign the form [2298] to state the verdict upon which you have unanimously agreed, and then return with it to the courtroom.

Counsel approach the bench, please.

(Bench conference)

THE COURT: Exceptions.

MR. WARREN: Your Honor, I don't believe the Court instructed on accomplice testimony. The Court did instruct on informant testimony. I would request that the Court give Devitt & Blackmar 17.06 which talks about accomplices.

THE COURT: I think I instructed on people who plead guilty to the same series of acts which, in effect, are accomplices. I think that covered it.

MR. WARREN: I don't think the Court gave an instruction that the jury must unanimously agree on the two predicate acts which constitute RICO.

THE COURT: I may not have.

MR. WARREN: That's all.

THE COURT: All right.

(End of bench conference)

THE COURT: Perhaps I missed one thing ladies and gentlemen. As far as count 6 is concerned on the racketeering charge, you each must unanimously agree upon the predicate acts if you find him guilty of that. You must unanimously agree upon which predicate act you find him guilty of.

[2299] All right. Now I have to say, Mrs. Wright and Mr. Stewart and Mr. Chien, I am going to excuse you now. I'm amazed that we have been able to get through all of this time, these four weeks, without anybody but Mrs. Anderson getting sick or having an accident or something. I thank you. You've been just as important to the case as if you were one of the 12 having now to go back really to work, because we couldn't carry on the case unless it was—people like you would be willing to come with us and stay with us for this length of time.

I thank you on behalf of all two and a half million of us here in the Southern District of California. You leave your tag by your chair and you are excused.

The rest of you now—

A JUROR: Your Honor, may we take these with us?

THE COURT: You may take it with you, if you wish.

A JUROR: Thank you.

THE COURT: The rest of you now, you can go back to the jury room and begin your deliberations. And now, my admonitions that I have been giving you for this long time are off. Now you have a duty to talk to each other about the case and form and express your opinions,

and I am going to send in at this time the cocaine for you to look at, not to use, for you to look at for whatever length of time you want to. Then it's going to be brought back out and given to the [2300] D.E.A. to put away. So you may now retire and begin your deliberations.

Swear the bailiff.

DEPUTY CLERK: I did.

(Jury excused to deliberate at 3:55 p.m.)

* * * *

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

JUDGMENT INCLUDING SENTENCE UNDER THE SENTENCING REFORM ACT

Criminal Case No. 90-0925-N

UNITED STATES OF AMERICA

vs.

JUAN PAUL ROBERTSON

X The defendant was found guilty on count(s) one through four and six of the superseding indictment after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Count
21 USC 846, 841(a)(1)	Conspiracy to Possess a Controlled with Intent to Distribute	Number(s)
21 USC 841(a)(1), 18 USC 2	Possession of a Controlled Substance with Intent to Distribute	1
18 USC 1962(a)	Racketeering Influenced Corrupt Organization	2-4
		6

The defendant is sentenced as provided in pages 2 through 4 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

X The defendant has been found not guilty on count(s) 5 and 8 and is discharged as to such count(s).

X The underlying indictment (is) (are) dismissed on the motion of the United States.

X It is ordered that the defendant shall pay to the United States a special assessment of $250.00 which shall be due immediately.

X It is determined that the defendant is unable to pay a fine.

It is further ordered that the defendant shall notify the United States Attorney for this district within thirty days of any change of residence or mailing address until all fines, restitution, costs and special assessments imposed by this Judgment are fully paid.

Defendant's Soc. Sec. Number:

None available

Defendant's Mailing Address:

None available

Defendant's Counsel:

Glenn Warren
2442 Fourth Ave.
San Diego, CA 92101

June 1, 1992
Date of Imposition of Sentence

/s/ Leland C. Nielsen
LELAND C. NIELSEN
Senior United States District Judge
Filed: June 1, 1992
DON HENDRIX, Clerk

By: /s/ T. Johnson
T. JOHNSON
Deputy Clerk

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of two hundred forty (240) months as to count 1, sixty (60) months as to counts 2 & 3, thirty-six (36) months as to count 4 and two hundred forty (240) months as to count six. Counts 2 through 6 are to run concurrently to each other and to count for a total of 240 months.

X The Court makes the following recommendations to the Bureau of Prisons:

* * * *

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be supervised release for a term of five (5) years as to counts one through four and three (3) years as to count six. Counts two through six are to run concurrently to each other and to count one.

While on supervised release, the defendant shall not commit another federal, state or local crime and shall comply with the standard conditions that have been adopted by this Court (set forth on the following page). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

X The defendant shall not possess any firearms or other dangerous weapons.

X The defendant shall submit to search of person, property, residence, or vehicle conducted in a reasonable manner and at a reasonable time by the Probation Officer.

X The defendant shall participate in a program of drug or alcohol abuse treatment including urinalysis testing and counseling as directed by the Probation Department.

X The defendant shall provide complete disclosure of personal and business financial records to the Probation Officer as requested.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on probation or supervised release pursuant to this judgment:

1) The defendant shall not commit another federal, state or local crime;

2) The defendant shall not leave the judicial district without the permission of the court or probation officer;

3) The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

4) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

5) The defendant shall support his or her dependents and meet other family responsibilities;

6) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training or other acceptable reasons;

7) The defendant shall notify the probation officer within seventy-two hours of any change in residence or employment;

8) The defendant shall refrain from excessive use of alcohol and shall not purchase, use, distribute, or administer any narcotic or controlled substance, or

any paraphernalia related to such substances, except as prescribed by a physician;

9) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

10) The defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

11) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

12) The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

13) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

14) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

These conditions are in addition to any other conditions imposed by this Judgement.

SUPREME COURT OF THE UNITED STATES

No. 94-251

UNITED STATES, PETITIONER

v.

JUAN PAUL ROBERTSON

[Filed October 17, 1994]

ORDER ALLOWING CERTIORARI

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted.

October 17, 1994

☆ U. S. GOVERNMENT PRINTING OFFICE: 1994 387147 20016

Supreme Court, U.S.
FILED
DEC 1 1994
OFFICE OF THE CLERK

No. 94-251

In the Supreme Court of the United States

OCTOBER TERM, 1994

UNITED STATES OF AMERICA, PETITIONER

v.

JUAN PAUL ROBERTSON

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

DREW S. DAYS, III
Solicitor General

JO ANN HARRIS
Assistant Attorney General

MICHAEL R. DREEBEN
Acting Deputy Solicitor General

MIGUEL A. ESTRADA
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether the interstate movement of goods and people in connection with the operation of a gold mine is sufficient to justify the conclusion that the activities of the gold mine affect interstate commerce within the meaning of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. 1962(a).

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Constitutional and statutory provisions involved	2
Statement	2
Summary of argument	7
Argument:	
The activities of respondent's gold mining enterprise "affected interstate commerce" within the meaning of RICO	9
A. Congress intended the RICO statute to reach to the full extent of the Commerce Clause power	10
B. The activities of respondent's gold mining enterprise affected interstate commerce	16
Conclusion	27
Appendix	1a

TABLE OF AUTHORITIES

Cases:

Atlantic Cleaners & Dyers, Inc. v. *United States*, 286 U.S. 427 (1932)	14
Bunker Ramo Corp. v. *United Business Forms, Inc.*, 713 F.2d 1272 (7th Cir. 1983)	24
Daniel v. *Paul*, 395 U.S. 298 (1969)	18
FTC v. *Fred Meyer, Inc.*, 390 U.S. 341 (1968)	16
Goldfarb v. *Virginia State Bar*, 421 U.S. 773 (1975)	25
Gulf Oil Corp. v. *Copp Paving Co.*, 419 U.S. 186 (1974)	11
H.J. Inc. v. *Northwestern Bell Telephone Co.*, 492 U.S. 229 (1989)	12
Heart of Atlanta Motel, Inc. v. *United States*, 379 U.S. 241 (1964)	17

Cases—Continued: Page

Hodel v. *Indiana*, 452 U.S. 314 (1981) 17
Hodel v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981) 17
Hospital Bldg. Co. v. *Trustees of Rex Hospital*, 425 U.S. 738 (1976) 22, 25
Katzenbach v. *McClung*, 379 U.S. 294 (1964) 17, 18
Mandeville Island Farms, Inc. v. *American Crystal Sugar Co.*, 334 U.S. 219 (1948) 8-9, 25
McLain v. *Real Estate Board of New Orleans, Inc.*, 444 U.S. 232 (1980) 20
Musick v. *Burke*, 913 F.2d 1390 (9th Cir. 1990) 6, 7, 16
NLRB v. *Denver Bldg. & Constr. Trades Council*, 341 U.S. 675 (1951) 25
NLRB v. *Reliance Fuel Oil Corp.*, 371 U.S. 224 (1963) 11, 14
National Organization for Women, Inc. v. *Scheidler*, 114 S. Ct. 798 (1994) 10
New York v. *United States*, 112 S. Ct. 2408 (1992) 26
Perez v. *United States*, 402 U.S. 146 (1971) 20
Polish National Alliance v. *NLRB*, 322 U.S. 643 (1944) 11, 20
R.A.G.S. Couture, Inc. v. *Hyatt*, 774 F.2d 1350 (5th Cir. 1985) 24
Reves v. *Ernst & Young*, 113 S. Ct. 1163 (1993) 10
Rose v. *Bartle*, 871 F.2d 331 (3d Cir. 1989) 19, 24
Russell v. *United States*, 471 U.S. 858 (1985) 10, 11, 14, 20, 21
Russello v. *United States*, 464 U.S. 16 (1983) 12, 13
Scarborough v. *United States*, 431 U.S. 563 (1977) 10-11, 17, 22, 23
Sedima, S.P.R.L. v. *Imrex Co.*, 473 U.S. 479 (1985) 12
Stirone v. *United States*, 361 U.S. 212 (1960) 12
Summit Health, Ltd. v. *Pinhas*, 500 U.S. 322 (1991) 25, 26
United States v. *Allen*, 656 F.2d 964 (4th Cir. 1981) 9, 19
United States v. *Altomare*, 625 F.2d 5 (4th Cir. 1980) 19, 22

Cases—Continued: Page

United States v. *American Bldg. Maintenance Indus.*, 422 U.S. 271 (1975) 11
United States v. *Barton*, 647 F.2d 224 (2d Cir.), cert. denied, 454 U.S. 857 (1981) 19
United States v. *Borromeo*, 954 F.2d 245 (4th Cir.), cert. denied, 112 S. Ct. 3012 (1992) 19
United States v. *Brown*, 959 F.2d 63 (6th Cir. 1992) 12
United States v. *Butt*, 955 F.2d 77 (1st Cir. 1992) .. 12
United States v. *Calder*, 641 F.2d 76 (2d Cir.), cert. denied, 451 U.S. 912, 454 U.S. 843 (1981) .. 12
United States v. *Conn*, 769 F.2d 420 (7th Cir. 1985) 19
United States v. *Culbert*, 435 U.S. 371 (1978) 12
United States v. *Darby*, 312 U.S. 100 (1941) 17, 22
United States v. *Doherty*, 867 F.2d 47 (1st Cir.), cert. denied, 492 U.S. 918 (1989) 9, 22, 25
United States v. *Farmer*, 924 F.2d 647 (7th Cir. 1991) 19
United States v. *Gambino*, 566 F.2d 414 (2d Cir. 1977), cert. denied, 435 U.S. 952 (1978) 12
United States v. *Long*, 651 F.2d 239 (4th Cir.), cert. denied, 454 U.S. 896 (1981) 19
United States v. *Malatesta*, 583 F.2d 748 (1978), aff'd en banc, 590 F.2d 1379 (5th Cir.), cert. denied, 440 U.S. 962, 444 U.S. 846 (1979) 23
United States v. *Mannino*, 635 F.2d 110 (2d Cir. 1980) 9
United States v. *McManigal*, 708 F.2d 276 (7th Cir.), vacated, 464 U.S. 979 (1983) 21, 22
United States v. *Muskovsky*, 863 F.2d 1319 (7th Cir. 1988), cert. denied, 489 U.S. 1067 (1989) ..9-10, 18
United States v. *Norton*, 867 F.2d 1354 (11th Cir.), cert. denied, 491 U.S. 907, 493 U.S. 871 (1989) 10, 18
United States v. *Robinson*, 763 F.2d 778 (6th Cir. 1985) 9, 18
United States v. *Stratton*, 649 F.2d 1066 (5th Cir. 1981) 9
United States v. *Sullivan*, 332 U.S. 689 (1948) 17-18, 23

Cases—Continued: Page

United States v. *Turkette*, 452 U.S. 576 (1981) ..10, 15, 16
United States v. *Women's Sportswear Mfrs. Ass'n*, 336 U.S. 460 (1949) 18
United States v. *Wrightwood Dairy Co.*, 315 U.S. 110 (1942) 17, 20, 21
Wickard v. *Filburn*, 317 U.S. 111 (1942) 17, 20, 21

Constitution and statutes:

U.S. Const.:
Art. I, § 8, Cl. 3 (Commerce Clause).....2, 8, 10, 14, 16, 20, 23, 24, 25, 1a
Art. I, § 8, Cl. 18 (Necessary and Proper Clause) 17
Hobbs Act, 18 U.S.C. 1951 ..... 11, 12
18 U.S.C. 1951 (a) 11-12
Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922:
§ 1, 84 Stat. 922-923 13
§ 1, 84 Stat. 923 14
Tit. IX, 84 Stat. 941 13
§ 904 (a) 84 Stat. 947 14
Tit. XI, 84 Stat. 952 14
§ 1102, 84 Stat. 956-958 11
Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. 1961 *et seq.* 2
18 U.S.C. 1961 (1988 & Supp. V 1993) 1a
18 U.S.C. 1961 note 13, 14
18 U.S.C. 1962 ..... 9, 5a
18 U.S.C. 1962 (a) 2, 5, 6, 7, 10, 11, 16, 5a
18 U.S.C. 1963 5
Sherman Act, 15 U.S.C. 1 20
18 U.S.C. 844 (i) 11
21 U.S.C. 841 (a) (1) 2, 5
21 U.S.C. 843 (b) 5
21 U.S.C. 846 ..... 2, 5
21 U.S.C. 848 5

Miscellaneous:

115 Cong. Rec. 827 (1969) 15

Miscellaneous—Continued: Page

116 Cong. Rec. (1970):
p. 591 15
p. 603 15
p. 606 15
p. 35,193 15
p. 35,201 15
p. 35,294 15
H.R. Rep. No. 1574, 90th Cong., 2d Sess. (1968) 15
H.R. Rep. No. 1549, 91st Cong., 2d Sess. (1970) 14
S. Rep. No. 617, 91st Cong., 1st Sess. (1969) 14, 16

In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-251

UNITED STATES OF AMERICA, PETITIONER

v.

JUAN PAUL ROBERTSON

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-36a) is reported at 15 F.3d 862.

JURISDICTION

The judgment of the court of appeals was entered on February 1, 1994. The court of appeals denied a petition for rehearing on April 26, 1994. Pet. App. 37a-38a. On July 15, 1994, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including August 24, 1994. The petition for a writ of certiorari was filed on August 10, 1994, and was granted on October 17,

1994. J.A. 79. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Commerce Clause of the United States Constitution, Article I, Section 8, Clause 3, and the pertinent provisions of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. 1961 *et seq.*, are set forth in an appendix to this brief.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of California, respondent was convicted on one count of conspiracy to possess cocaine with intent to distribute it, in violation of 21 U.S.C. 846; three counts of possession of cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1); and one count of investing proceeds from a pattern of racketeering activity in an enterprise the activities of which affected interstate and foreign commerce, in violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1962(a). Respondent was sentenced to concurrent terms of 20 years' imprisonment on each of the five counts. The court of appeals affirmed respondent's narcotics convictions, but it reversed his RICO conviction. Pet. App. 1a-36a.

1. Respondent is a former Assistant United States Attorney who became a criminal defense lawyer in Los Angeles, California. He specialized in defending narcotics cases, and eventually became involved in the narcotics trade. On November 15, 1983, respondent was retained to represent Julio Silva-

Lopera (Silva), who had been arrested on a cocaine charge by agents of the Drug Enforcement Administration. Silva told respondent that he had two kilograms of cocaine and $980,000 in the trunk of his Cadillac. Silva instructed respondent to have Silva's wife place the Cadillac in storage until Silva was released from jail. Respondent assured Silva that he would take care of the matter. Pet. App. 2a-3a; Tr. 61-76, 363-364.

Instead of complying with Silva's request, respondent stole the Cadillac and its contents. On November 22, 1983, respondent drove the Cadillac to the home of his estranged wife in Phoenix, Arizona. Respondent's wife, a former federal probation officer in Los Angeles, saw cocaine and a large amount of money in the trunk. Respondent instructed her to open a safe deposit box at a Phoenix bank and deposit the money, which she and her father estimated to be a half-million dollars. Respondent also instructed her to make deposits of less than $10,000 into different banks in the Phoenix area. Respondent told Silva that he had been unable to locate the car; Silva then fired respondent and hired new counsel. Pet. App. 3a; Tr. 77-80, 371-380.

In February 1984, respondent quit the practice of law in California and reconciled with his wife. Respondent and his wife purchased a house near Phoenix for $270,000 in cash; they also made additional large cash purchases totaling $700,000. Pet. App. 3a; Tr. 383-405.

Respondent and his wife separated again in the fall of 1984. In January 1985, respondent moved into the home of Richard and Janet Horchler, where he continued his drug trafficking activities. The Horchlers saw respondent with several hundred

thousand dollars and large quantities of cocaine. Respondent wore rubber gloves when counting the money, telling Janet Horchler that he could not leave fingerprints on it. Pet. App. 4a; Tr. 824-826, 967-969.

Respondent agreed to finance a partnership with the Horchlers to mine gold in Alaska. A partnership agreement was drawn up between respondent and Richard Horchler's son, Robert. Respondent paid in cash for placer gold mining claims near Fairbanks, Alaska ($125,000), mining equipment (approximately $100,000), and the traveling expenses for seven employees to go to Alaska. Some of the equipment was purchased in Los Angeles and transported to Alaska. When Robert Horchler exhausted the cash that respondent initially gave him, Horchler flew to Arizona, where respondent gave him an additional $55,000. When that money ran out, respondent mailed an additional $25,000. Respondent telephoned Robert Horchler from Arizona on a number of occasions to check on the progress of the mine. Pet. App. 4a-5a; Tr. 612, 615-616, 906-907, 913-914.

The partnership with the Horchlers was dissolved during the first mining season, but respondent continued the mining operation through 1987 as the Robertson Mining Co. In 1986, respondent financed the mine's expenses by means of a $300,000 loan, secured by a mortgage on the house in Phoenix. Respondent again hired a number of employees from outside Alaska to work in the mine, and he also purchased a small airplane for flying to and from Alaska. Silva's Cadillac was driven to Alaska for use in the mining operation. The mine produced between $200,000 and $290,000 of gold. Most of the gold was sold in Alaska, although respondent took

approximately $30,000 worth of gold nuggets out of the State. Throughout the period of ownership, respondent and his employees traveled between Alaska and the lower 48 States. Pet. App. 4a-5a; Tr. 455-463, 608-611, 743-744, 774-784, 898-900, 911, 1296-1299, 1706, 1719, 1722-1725, 1749.

2. On October 17, 1991, a federal grand jury returned an eight-count superseding indictment against respondent charging him with conspiracy to possess cocaine with intent to distribute it, in violation of 21 U.S.C. 846 (Count 1); possession of cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1) (Counts 2 through 4); use of a communication facility in furtherance of a narcotics felony, in violation of 21 U.S.C. 843(b) (Count 5); investing proceeds from a pattern of racketeering activity in an enterprise the activities of which affected interstate and foreign commerce (*i.e.*, the gold mine in Alaska), in violation of 18 U.S.C. 1962(a) (Count 6); RICO forfeiture, 18 U.S.C. 1963 (Count 7); and conducting a continuing criminal enterprise, in violation of 21 U.S.C. 848 (Count 8). The jury found respondent guilty on Counts 1 through 4 and on Count 6, but not guilty on Counts 5 and 8. The jury did not reach a decision on the forfeiture charged in Count 7; that count was later dismissed. Respondent was sentenced to concurrent terms of 20 years' imprisonment on each of the five counts. Pet. App. 6a-7a.[1]

---

[1] The district court declined to sentence respondent under the Sentencing Guidelines for his RICO conviction, which would have resulted in the sentence on that count being nonparolable. The government appealed the court's refusal

3. The court of appeals affirmed respondent's narcotics convictions, but it reversed his RICO conviction. Pet. App. 1a-36a. The court determined that there was insufficient proof that the activities of the "enterprise"—the Alaskan gold mine—"affect[ed] interstate or foreign commerce." 18 U.S.C. 1962(a). The court acknowledged that "[a] minimal effect on interstate commerce" is sufficient to satisfy that jurisdictional element, but, relying on circuit precedent, it stated that RICO's "interstate nexus requirement is not satisfied 'where local activities have incidental effects on interstate commerce.'" Pet. App. 8a-9a (quoting *Musick* v. *Burke*, 913 F.2d 1390, 1398 (9th Cir. 1990)). The court concluded that the "incidental effects" standard was not satisfied for several reasons.

The court first found no evidence that "the activities of the enterprise itself," as distinguished from the predicate acts of racketeering by which respondent funded the enterprise, affected interstate commerce. Pet. App. 9a. The court stated that the mine "was a relatively small and entirely local operation," which produced "only * * * approximately $200,000 in gold," and that, "with the exception of a few nuggets which [respondent] kept, none of the gold obtained from the mine was sold outside Alaska." *Ibid.*

The court also found that respondent's purchase of supplies and equipment and his hiring of personnel outside of Alaska were insufficient to establish an effect on interstate commerce, explaining that "[t]he purchase of 'equipment and supplies drawn generally from the stream of interstate commerce' is insufficient

---

to apply the Guidelines to the RICO conviction, but the court of appeals did not reach the government's appeal, because of its reversal of the RICO conviction. See Pet. App. 26a-27a.

to establish the interstate nexus required under RICO." Pet. App. 9a-10a (quoting *Musick* v. *Burke*, 913 F.2d at 1397). The court further explained that

> [g]iven that Alaska is fairly isolated, most supplies must be shipped there via interstate commerce. Carried to its logical conclusion, the Government's argument would require us to find that any local Alaskan operation has an effect on interstate commerce merely because supplies, equipment and employees are shipped there. We decline to do so.

Id. at 10a. Finally, the court declined to give weight to respondent's travel to and from Alaska or the use of the Cadillac stolen from Silva in the mining operation, noting that those activities "had, at most, only an incidental effect on interstate commerce." *Ibid.*

SUMMARY OF ARGUMENT

A. RICO makes it unlawful for any person to use or invest any income derived from a pattern of racketeering activity in the "acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce." 18 U.S.C. 1962(a). It is well established that the phrase "affect * * * commerce" is a term of art that manifests Congress's intent to exercise its commerce power to the fullest extent permitted by the Constitution.

The legislative history and findings that Congress made upon RICO's enactment demonstrate that Congress was aware of the significance of the jurisdictional language it enacted, and that Congress deliberately adopted that broad formulation because of its concern about the aggregate effect of racketeering activities on the national economy. Those materials also

demonstrate that one of Congress's principal goals in enacting RICO was to protect even the smallest local enterprises against infiltration by organized crime—a goal that would be thwarted by the narrow reading of RICO's jurisdictional nexus requirement adopted by the Ninth Circuit in this case.

B. Applying the correct standard under the Commerce Clause, there was ample evidence that the activities of respondent's Alaskan gold mining enterprise "affect[ed] interstate or foreign commerce." The court of appeals conceded that respondent and his employees traveled between Alaska and the lower 48 States during the period of ownership, that supplies and equipment were shipped to the mine from the lower 48 States, that the mine sold a substantial amount of gold in Alaska, and that respondent mortgaged his Arizona home to finance the operations of the mine. In addition, respondent and his associates used the instrumentalities of interstate commerce—the telephone and the mails—in connection with the operations of the mine.

The Ninth Circuit erroneously found the government's proof insufficient on the ground that the proof established that the mine's activities had no more than "an incidental effect on interstate commerce" (Pet. App. 9a), and that, in view of Alaska's geographical isolation, it was insufficient to show that the mine, like most Alaskan businesses, obtained equipment and supplies through interstate shipments (*id.* at 9a-10a). While there was a time when "incidental" effects on interstate commerce were held beyond the power of Congress to regulate, this Court long ago abandoned that approach, and it has repeatedly refused invitations to "take th[e] long backward step" toward that discredited doctrine. *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*, 334 U.S. 219, 235 (1948). As for Alaska's geographical isolation, it is illogical to suggest that the greater a State's dependence on interstate commerce the less likely it will be that activities within its borders will affect interstate commerce. Because no State of the Union is entirely self-sufficient, acceptance of that principle would jeopardize Congress's ability to regulate commerce. No decision of this Court supports such a result.

ARGUMENT

THE ACTIVITIES OF RESPONDENT'S GOLD MINING ENTERPRISE "AFFECTED INTERSTATE COMMERCE" WITHIN THE MEANING OF RICO

Federal statutes regulating activity that "affects" interstate commerce have long been understood to be applicable whenever the activity in question involves the interstate movement of goods or people, or the use of instrumentalities of interstate commerce, such as the mails or the interstate wires. With the exception of the Ninth Circuit, every court of appeals has applied that principle in construing the requirement of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1962, that the activities of the "enterprise" must "affect[] interstate or foreign commerce." See *United States* v. *Doherty*, 867 F.2d 47, 68 (1st Cir.) (Breyer, J.), cert. denied, 492 U.S. 918 (1989); *United States* v. *Mannino*, 635 F.2d 110, 118 (2d Cir. 1980); *United States* v. *Allen*, 656 F.2d 964, 964 (4th Cir. 1981) (per curiam); *United States* v. *Stratton*, 649 F.2d 1066, 1075 n.12 (5th Cir. 1981); *United States* v. *Robinson*, 763 F.2d 778, 781 (6th Cir. 1985); *United States* v. *Muskovsky*, 863

F.2d 1319, 1325 (7th Cir. 1988), cert. denied, 489 U.S. 1067 (1989); *United States* v. *Norton*, 867 F.2d 1354, 1359 (11th Cir.), cert. denied, 491 U.S. 907, 493 U.S. 871 (1989). The majority view is correct, and this Court should accordingly reject the Ninth Circuit's contrary construction of RICO.

A. Congress Intended The RICO Statute To Reach To The Full Extent Of The Commerce Clause Power

1. In construing RICO, this Court has consistently emphasized that the statutory language "must ordinarily be regarded as conclusive." *United States* v. *Turkette*, 452 U.S. 576, 580 (1981). See also *National Organization for Women, Inc.* v. *Scheidler*, 114 S. Ct. 798, 806 (1994); *Reves* v. *Ernst & Young*, 113 S. Ct. 1163, 1169 (1993). RICO makes it unlawful for any person to use or invest any income derived from a pattern of racketeering activity in the "acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce." 18 U.S.C. 1962(a). That language indicates Congress's intention to exercise its full constitutional authority under the Commerce Clause.

As this Court has repeatedly noted, Congress is well aware of the distinction established by this Court's Commerce Clause cases between legislation limited to activities "in" commerce and the more expansive legislation covering activities that "affect" commerce. *Russell* v. *United States*, 471 U.S. 858, 859 n.4 (1985);[2] *Scarborough* v. *United States*, 431

[2] In *Russell*, this Court unanimously rejected the claim that the attempted arson of a two-unit apartment building, which the defendant owned and held for use as rental property, did not have a sufficient effect on interstate commerce to warrant conviction under 18 U.S.C. 844(i). Like RICO, Section 844(i) was enacted as part of the Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 1102, 84 Stat. 956-958. Section 844(i) criminalizes the arson or attempted arson of "any building, vehicle, or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce."

U.S. 563, 571 (1977); *United States* v. *American Bldg. Maintenance Indus.*, 422 U.S. 271, 280 (1975). When Congress legislates solely with respect to activities "in" commerce, the statute ordinarily will reach only those activities that are actually within the flow of commerce or directly connected with it. See, *e.g.*, *Gulf Oil Corp.* v. *Copp Paving Co.*, 419 U.S. 186, 194-195 (1974). When it employs the phrase "affecting interstate commerce," however, Congress "expresses an intent * * * to exercise its full power under the Commerce Clause." *Russell* v. *United States*, 471 U.S. at 859; see also *NLRB* v. *Reliance Fuel Oil Corp.*, 371 U.S. 224, 226 (1963) (per curiam) (by using phrase "affecting commerce," Congress intended to exercise "the fullest jurisdictional breadth constitutionally permissible under the Commerce Clause") (emphasis omitted); *Polish National Alliance* v. *NLRB*, 322 U.S. 643, 647 (1944) ("when [Congress] wants to bring aspects of commerce within the full sweep of its constitutional authority, it manifests its purpose by regulating not only 'commerce' but also matters which 'affect,' 'interrupt,' or 'promote' interstate commerce").[3]

[3] In this regard, RICO's reach is similar to that of the Hobbs Act, 18 U.S.C. 1951. Compare 18 U.S.C. 1962(a) ("any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce") with 18 U.S.C.

Congress adopted both formulations conjunctively in enacting RICO, and thereby clearly evinced its intent to cover all "enterprises" that come within the scope of the constitutional power to regulate commerce. That broad jurisdictional reach is consistent with Congress's more general approach to RICO. As this Court has noted, "the pattern of the RICO statute" is to "utiliz[e] terms and concepts of breadth." *Russello* v. *United States*, 464 U.S. 16, 21 (1983); see also *H.J. Inc.* v. *Northwestern Bell Telephone Co.*, 492 U.S. 229, 237, 249 (1989). RICO therefore "is to be read broadly" in accordance with that "self-consciously expansive language and overall approach." *Sedima, S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479, 497-498 (1985). Neither the Ninth Circuit nor respondent has provided a persuasive reason for departing from

---

1951(a) ("[w]hoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce"). Following this Court's lead, the courts of appeals have uniformly interpreted the Hobbs Act to reach the activities of even the smallest local enterprises. See, *e.g.*, *United States* v. *Culbert*, 435 U.S. 371, 373 (1978) ("These words do not lend themselves to restrictive interpretation; as we have recognized, they 'manifest . . . a purpose to use all the constitutional power Congress has to punish interference with interstate commerce' "), quoting *Stirone* v. *United States*, 361 U.S. 212, 215 (1960); *United States* v. *Brown*, 959 F.2d 63, 67-68 (6th Cir. 1992) (tavern sold beer brewed in another State); *United States* v. *Butt*, 955 F.2d 77, 80 n.2 (1st Cir. 1992) (both RICO and the Hobbs Act reach extortion of protection money from prostitutes in Malden, Massachusetts); *United States* v. *Calder*, 641 F.2d 76, 78 (2d Cir.) (restaurant sold Canadian wine), cert. denied, 451 U.S. 912, 454 U.S. 843 (1981); *United States* v. *Gambino*, 566 F.2d 414, 418-419 (2d Cir. 1977) (private garbage collection in the Bronx), cert. denied, 434 U.S. 952 (1978).

that principle in the context of the interstate nexus requirement.

2. The legislative history of RICO confirms the breadth of the jurisdictional authority that Congress intended to invoke. RICO was enacted as Title IX of the Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 941, which grew out of deep congressional concern about the growth of organized crime in the United States. That concern is reflected in the "Statement of Findings and Purpose" that prefaced the Act (Pub. L. No. 91-452, § 1, 84 Stat. 922-923, 18 U.S.C. 1961 note), which describes the problem of organized crime and its effects on the economic health of the Nation.

Congress found that "organized crime in the United States is a highly sophisticated, diversified, and widespread activity that annually drains billions of dollars from America's economy by unlawful conduct and the illegal use of force, fraud, and corruption," that money and power derived from those illegal endeavors "are increasingly used to infiltrate and corrupt legitimate business and labor unions," and that "organized crime activities in the United States weaken the stability of the Nation's economic system * * * [and] seriously burden interstate and foreign commerce." Pub. L. No. 91-452, § 1, 84 Stat. 922-923, 18 U.S.C. 1961 note. Based on those findings, Congress intended that RICO would "provide new weapons of unprecedented scope for an assault upon organized crime and its economic roots." *Russello* v. *United States*, 464 U.S. at 26. And Congress reinforced the sweep of those new weapons by expressly directing that "[t]he provisions of [RICO] shall be liberally construed to effectuate its remedial

purposes." Pub. L. No. 91-452, § 904(a), 84 Stat. 947.

Congress did not limit its focus to the corruption or infiltration of business enterprises that were engaged in widespread interstate commercial activity. Quite the contrary, the Statement of Findings and Purpose reflects Congress's concern with the aggregate effect of organized crime's pernicious illegal activities on the national economy, and declares as RICO's purpose "the eradication of organized crime in the United States." Pub. L. No. 91-452, § 1, 84 Stat. 923, 18 U.S.C. 1961 note. Congress clearly understood that attainment of that ambitious goal required the invocation of its full constitutional authority under the Commerce Clause. Cf. *Atlantic Cleaners & Dyers, Inc.* v. *United States*, 286 U.S. 427, 435 (1932). Indeed, the House committee report that accompanied the Organized Crime Control Act of 1970 reflects Congress's specific awareness of the significance of the jurisdictional language it chose; in discussing the related provisions of Title XI (which were at issue in *Russell* v. *United States*, *supra*), the report cited this Court's opinion in *NLRB* v. *Reliance Fuel Oil Corp.*, *supra*, for the proposition that "the term affecting [interstate or foreign] 'commerce' represents 'the fullest jurisdictional breadth constitutionally permissible under the Commerce Clause." H.R. Rep. No. 1549, 91st Cong., 2d Sess. 70 (1970) (quoting 371 U.S. at 226).

Moreover, Congress realized that "[c]ontrol of business concerns ha[d] been acquired by the sub rosa investment of profits acquired from illegal ventures," S. Rep. No. 617, 91st Cong., 1st Sess. 77 (1969), and accordingly it was particularly concerned about the infiltration of legitimate businesses by organized crime. That "point is made time and again

during the debates and in the hearings before the House and Senate." *United States* v. *Turkette*, 452 U.S. at 591.[4] The Senate committee report that accompanied the legislation makes clear that many of the businesses that had been infiltrated by organized crime were, by their nature, purely local enterprises,

---

[4] See, *e.g.*, 115 Cong. Rec. 827 (1969) (remarks of Sen. McClellan) ("Organized crime * * * uses its ill-gotten gains * * * to infiltrate and secure control of legitimate business and labor union activities"); 116 Cong. Rec. 591 (1970) (remarks of Sen. McClellan) ("illegally gained revenue also makes it possible for organized crime to infiltrate and pollute legitimate business"); *id.* at 603 (remarks of Sen. Yarborough) ("[RICO] is designed to root out the influence of organized crime in legitimate business, into which billions of dollars of illegally obtained money is channeled"); *ibid.* (remarks of Sen. Allott) ("gambling * * * provides most of the funds that yearly pour into * * * the infiltration of labor unions and legitimate businesses"); *id.* at 606 (remarks of Sen. Byrd) ("loan sharking paves the way for organized criminals to gain access to and eventually take over the control of thousands of legitimate businesses"); *id.* at 35,193 (remarks of Rep. Poff) ("[T]itle IX * * * will deal not only with individuals, but also with the economic base through which those individuals constitute such a serious threat to the economic well-being of the Nation. In short, an attack must be made on their source of economic power itself"); *id.* at 35,201 (remarks of Rep. Poff) ("The money which the syndicate uses to infiltrate legitimate business enterprises comes largely from gambling receipts"); *id.* at 35,294 (remarks of Rep. Poff) ("the profits of illegal gambling * * * go[] far toward providing the capital that eventually goes into * * * the infiltration of legitimate businesses"); H.R. Rep. No. 1574, 90th Cong., 2d Sess. 5 (1968) ("The President's Crime Commission found that the greatest menace that organized crime presents is its ability through the accumulation of illegal gains to infiltrate into legitimate business and labor unions").

such as bowling alleys, ballrooms, restaurants, and drug stores. See S. Rep. No. 617, *supra*, at 76-77. Indeed, Congress expressed special concern for the "small or marginal businessman who is most easily subject to invasion by organized crime." *Id.* at 77.

Congress could not have believed that the connection of those small businesses with interstate commerce would typically be more extensive than "[t]he purchase of 'equipment and supplies drawn generally from the stream of interstate commerce.'" Pet. App. 9a-10a (quoting *Musick* v. *Burke*, 913 F.2d 1390, 1397 (9th Cir. 1990)). Yet under the Ninth Circuit's view of RICO's interstate nexus requirement, it is precisely those small and local business "enterprises" that organized crime can capture without fear of liability under 18 U.S.C. 1962(a). Thus, under the view taken by the Ninth Circuit, "[w]hole areas of organized criminal activity would be placed beyond the substantive reach of the enactment." *United States* v. *Turkette*, 452 U.S. at 589. There is no warrant for embracing a result so contrary to the goals that Congress intended to accomplish. See, *e.g.*, *FTC* v. *Fred Meyer, Inc.*, 390 U.S. 341, 349 (1968).

B. The Activities Of Respondent's Gold Mining Enterprise Affected Interstate Commerce

The court of appeals did not dispute that Congress intended to invoke its full constitutional authority under the Commerce Clause in enacting RICO. It relied extensively on its earlier decision in *Musick* v. *Burke*, *supra*, which held that the jurisdictional reach of RICO extends to the limits of Congress's constitutional power. 913 F.2d at 1398. The court seriously erred, however, in concluding that the activities of

respondent's gold mine did not affect interstate commerce under the constitutional standard.

1. While respondent's gold mine was not a large enterprise, Congress's power to regulate interstate commerce, combined with the Necessary and Proper Clause, Art. I, § 8, Cl. 18, extends to "relatively small and entirely local operation[s]" (Pet. App. 9a). This Court has held that Congress's power reaches the farmer who grows wheat and bakes his own bread, because even that wholly intrastate activity can affect interstate commerce. *Wickard* v. *Filburn*, 317 U.S. 111, 127-128 (1942). The commerce power also reaches regulation of the price of intrastate milk sales, because those sales affect the price of interstate sales. *United States* v. *Wrightwood Dairy Co.*, 315 U.S. 110, 119-121 (1942). It reaches the local employment practices of employers whose goods later are shipped interstate. *United States* v. *Darby*, 312 U.S. 100, 118-123 (1941). And it reaches small family-owned restaurants and motels, because they may obtain food from out of state or serve interstate travelers. *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241, 252-258 (1964); *Katzenbach* v. *McClung*, 379 U.S. 294, 296-301 (1964). See also *Hodel* v. *Indiana*, 452 U.S. 314, 324 (1981) (commerce power allows Congress to protect "prime farmland" from damage); *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 280-283 (1981) (commerce power allows Congress to regulate the environmental impact of "surface mining" for coal on private land, even if that activity might be characterized as "local" land use); *Scarborough* v. *United States*, 431 U.S. at 575 (commerce power allows Congress to forbid felons to possess guns that have ever traveled interstate); *United States* v.

Sullivan, 332 U.S. 689, 697-698 (1948) (commerce power allows Congress to prohibit relabeling of drugs after interstate shipment). In sum, "[i]f it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze." *United States* v. *Women's Sportswear Mfrs. Ass'n*, 336 U.S. 460, 464 (1949).

Under the constitutional standard, there was ample evidence that the activities of respondent's gold mine affected interstate and foreign commerce. The court of appeals conceded (Pet. App. 4a, 9a-10a) that the mine purchased mining equipment and supplies, and hired employees, from outside the State. Respondent also purchased an airplane that he used to travel to and from Alaska, and he took the Cadillac that he had stolen from Silva from California to Alaska, where the car was used in the mine's work. *Id.* at 5a, 10a. Those activities are sufficient, by themselves, to establish the requisite effect on interstate commerce, because they contributed directly to the movement of goods and persons across state lines. See, *e.g.*, *Katzenbach* v. *McClung*, 379 U.S. at 300-301 (restaurant's purchase of food from out of state affected commerce); *Daniel* v. *Paul*, 395 U.S. 298, 308 (1969) (club's purchase of a juke box manufactured out of state, which played records manufactured out of state, affected commerce); *United States* v. *Norton*, 867 F.2d at 1359 (interstate commerce affected when union officials traveled between Florida and Illinois); *United States* v. *Muskovsky*, 863 F.2d at 1325 (RICO's interstate nexus satisfied "simply because [the enterprise] purchases supplies and office equipment from companies located outside of Illinois"); *United States* v. *Robinson*, 763 F.2d at 781 (sale of "alcohol * * * manufactured out of state" provided "a sufficient

impact upon interstate commerce for purposes of" RICO); *United States* v. *Allen*, 656 F.2d at 964 ("the supplies used in Allen's bookmaking operations which originated outside of Maryland provided a sufficient nexus between the enterprise and interstate commerce to invoke RICO").[5]

Quite apart from the interstate travel and shipments generated by the enterprise, the gold mine's intrastate activities affected commerce. As this Court has repeatedly recognized, intrastate conduct, even if "trivial" when considered in isolation, comes within

---

[5] See also *United States* v. *Borromeo*, 954 F.2d 245, 248 (4th Cir.) (enterprise "ordered controlled substances from Ohio and Maryland"), cert. denied, 112 S. Ct. 3012 (1992); *United States* v. *Farmer*, 924 F.2d 647, 651 (7th Cir. 1991) (drug scales were manufactured in another State); *United States* v. *Conn*, 769 F.2d 420, 424 (7th Cir. 1985) (enterprise "purchased equipment and office supplies from companies located outside the State of Illinois"); *Rose* v. *Bartle*, 871 F.2d 331, 356-358 (3d Cir. 1989) ("minimal" interstate nexus required by RICO satisfied by the fact that enterprise had entered into contracts with out-of-state businesses); *United States* v. *Long*, 651 F.2d 239, 241-242 (4th Cir.) (state senator's office affected interstate commerce because senator served as a member of the committee that appropriated the funds used for operating expenses and purchases by state agencies, including the agency responsible for licensing liquor coming into the state through interstate commerce), cert. denied, 454 U.S. 896 (1981); *United States* v. *Barton*, 647 F.2d 224, 234 (2d Cir.) (restaurant purchased less liquor and fish from other countries), cert. denied, 454 U.S. 857 (1981); *United States* v. *Altomare*, 625 F.2d 5, 8 (4th Cir. 1980) (activities of state prosecutor's office sufficiently affected interstate commerce when interstate telephone calls were placed from that office, supplies and materials used by the office originated outside the State, and out-of-state residents were involved in litigation with the office).

the reach of the Commerce Clause when it is part of a class of activities that in the aggregate substantially affects interstate or foreign commerce. See *Russell* v. *United States*, 471 U.S. at 862; *Perez* v. *United States*, 402 U.S. 146, 153-154 (1971); *Wickard* v. *Filburn*, 317 U.S. at 127-128; *United States* v. *Wrightwood Dairy Co.*, 315 U.S. at 120.[6] As the court of appeals acknowledged (Pet. App. 9a), respondent's mine sold a significant amount of gold (worth at least $200,000) in Alaska. During the period of respondent's ownership, there were only three companies that purchased gold for refining and assaying in the area where the mine was located, and

[6] As this Court noted in *Perez* v. *United States*, 402 U.S. at 152-153, Congress has, on occasion, itself made the finding that a class of activities substantially affects commerce, and has dispensed with any requirement of further proof on the subject in each individual case. That class-of-activities analysis, however, also applies when Congress has required proof, in each individual case, that the regulated activity affected commerce. As the Court explained in *Polish National Alliance* v. *NLRB*, 322 U.S. at 648: "Congress [in the National Labor Relations Act, 29 U.S.C. 152(7)] * * * left it to the Board to ascertain whether proscribed practices would in particular situations adversely affect commerce when judged by the full reach of the constitutional power," but that question "is not to be determined by confining judgment to the quantitative effect of the activities immediately before the Board. Appropriate for judgment is the fact that the immediate situation is representative of many others throughout the country, the total incidence of which if left unchecked may well become far-reaching in its harm to commerce." See also *McLain* v. *Real Estate Board of New Orleans, Inc.*, 444 U.S. 232, 241-243, 246 (1980) (under Sherman Act, 15 U.S.C. 1, the requirement of an effect on interstate commerce may be satisfied by showing that the line of business, rather than the illegal conduct, affected commerce).

respondent and his associates developed commercial relationships with two of them. Tr. 1004-1015, 774-784.[7] The price paid per ounce by those Alaskan refiners to respondent and others fluctuated daily, and was based on the "spot" price set each morning by European traders in London, England. Tr. 1011. The record therefore established that the mine's intrastate output and sales were but part of the much larger market in precious metals that reached beyond the State, and indeed beyond the United States. See *Russell* v. *United States*, 471 U.S. at 862 (property "was * * * being used in an activity affecting commerce," because "the local rental of an apartment unit is merely an element of a much broader commercial market in rental properties"). In those circumstances, the intrastate sale of the mine's output clearly affected interstate and foreign commerce under this Court's cases. See *Wickard* v. *Filburn*, 317 U.S. at 127-128; *United States* v. *Wrightwood Dairy Co.*, 315 U.S. at 120; see also *United States* v. *McManigal*, 708 F.2d 276, 283 (7th Cir.), vacated on other grounds, 464 U.S. 979 (1983).[8]

[7] The business records of the two refiners that purchased gold from respondent's mine—General Refining Corporation and Oxford Assaying and Refining Company—were introduced in evidence. See, *e.g.*, Government Exhibits (GXs) 259, 260, 261, 264, 266. The records relating to General Refining Corporation reflect the interstate nature of that refiner's gold business, since the firm's transaction records set forth the firm's addresses and telephone numbers not only in Alaska, but also in Hempstead, New York, and Los Angeles, California. See, *e.g.*, GXs 261, 262.

[8] The court of appeals also noted that respondent kept "a few nuggets" of the gold. Pet. App. 9a. That gold, which respondent took outside Alaska, was worth approximately

In addition, as the court of appeals noted (Pet. App. 4a-5a), respondent mortgaged his Phoenix home (purchased with cash stolen from Silva) to finance the mining enterprise's expenses in Alaska. The financial requirements of the mine therefore had an indirect effect on the market for real estate and credit in Arizona. By the same token, the Arizona transaction had the indirect effect of keeping the gold mine open in Alaska. A business that requires funds from out of state, and that is able to raise those funds by transactions in another State, clearly has an effect on interstate commerce. See *Hospital Bldg. Co.* v. *Trustees of Rex Hospital*, 425 U.S. 738, 744 (1976) (effect on interstate commerce was properly alleged under the Sherman Act where out-of-state financing would not occur if the challenged anticompetitive practice succeeded); see also *United States* v. *McManigal*, 708 F.2d at 283.

Finally, the enterprise unquestionably used instrumentalities of interstate commerce—the telephone and the mails—to inform respondent of the progress of the operations, and it relied on those instrumentalities of interstate commerce to receive monetary support from respondent. See *Scarborough* v. *United States*, 431 U.S. at 575; *United States* v. *Doherty*, 867 F.2d at 68 ("slight" effect on interstate commerce required by RICO is satisfied by "placement of interstate telephone calls"), citing *United States* v. *Altomare*, 625 F.2d 5, 7-8 (4th Cir. 1980). See

---

$30,000. Tr. 774-784, 1723. The shipment of that gold outside of Alaska is additional persuasive evidence that the activities of the mine affected interstate commerce. Cf. *United States* v. *Darby*, 312 U.S. at 117-119 (local employment practices of employers affect interstate commerce because some of the goods produced were later shipped interstate).

also *United States* v. *Malatesta*, 583 F.2d 748, 754 (1978) ("*any one*" of several interstate telephone calls sufficient to meet RICO's jurisdictional requirement), aff'd en banc, 590 F.2d 1379 (5th Cir.), cert. denied, 440 U.S. 962, 444 U.S. 846 (1979). Even considered separately, any of the foregoing activities would be sufficient to meet the government's burden. Taken as a whole, the effect of the enterprise's activities on interstate commerce is unmistakable.[9]

2. The Ninth Circuit's erroneous ruling on the interstate commerce issue appears to rest on two interrelated propositions. First, while conceding that

---

[9] Respondent suggested at the petition stage that the interstate shipments of employees, equipment, and supplies that were established in this case should be disregarded, because they "d[id] not involve the operation of the enterprise but rather the establishment of the enterprise." Br. in Opp. 2. The court of appeals did not rely on that contention, which in any case is flawed factually and legally. As a factual matter, the interstate travel by respondent and his employees continued during respondent's entire period of ownership, as we have demonstrated (pp. 4-5, *supra*). Moreover, it is difficult to see how the purchase of supplies and equipment to be used in the day-to-day activities of the mine can possibly be disassociated from "the operation of the enterprise." As a legal matter, respondent has pointed to nothing in the language or legislative history of RICO, or in this Court's Commerce Clause cases, that supports the significance of the distinction on which he relies. On the contrary, Congress's express invocation of the "affecting commerce" test establishes that no such line was intended. See, *e.g.*, *Scarborough* v. *United States*, 431 U.S. at 564 n.1, 575 (in crime of "possess[ing] * * * affecting commerce * * * any firearm," jurisdictional element is satisfied by proof that the firearm was shipped in commerce at any point in time, even if that shipment occurred before the defendant acquired the firearm); *United States* v. *Sullivan*, 332 U.S. at 698.

proof of a "minimal" effect on interstate commerce is sufficient to satisfy RICO, the Ninth Circuit posited that "incidental" effects on commerce do not suffice, and it dismissed as "incidental" the movement of employees, equipment, and supplies to the mine from outside of Alaska during the period of ownership. Second, the Ninth Circuit appeared to believe that Alaska's geographical isolation and resulting dependence on interstate commerce meant that it was insufficient to show that out-of-state supplies were used in the enterprise. Pet. App. 9a-10a. Neither proposition has merit.[10]

First, the Ninth Circuit's distinction between "minimal" and "incidental" effects on commerce recalls "those mechanical distinctions" used in an earlier era of our Nation's Commerce Clause jurisprudence—during which activities "regarded as being only * * * 'incidental,' 'indirect,' or 'remote' " from an interstate transaction were deemed "to be * * *

---

[10] The Ninth Circuit also appeared to believe (Pet. App. 8a-9a) that the interstate character of RICO predicate acts cannot be considered in determining whether the activities of an enterprise affect interstate commerce. Respondent also placed some emphasis on that proposition at the petition stage. Br. in Opp. 2. That proposition, however, has scant relevance to this case, because the government argued that it had established an effect on interstate commerce by virtue of activities of the RICO enterprise into which respondent invested funds, not by virtue of the underlying predicate acts that generated the funds. In any event, as we explained in our reply brief at the petition stage (U.S. Reply Br. 4 n.2), respondent's characterization of RICO precedents in this area is erroneous. See also *Rose* v. *Bartle*, 871 F.2d at 357 n.38; *R.A.G.S. Couture, Inc.* v. *Hyatt*, 774 F.2d 1350, 1353-1354 (5th Cir. 1985); *Bunker Ramo Corp.* v. *United Business Forms, Inc.*, 713 F.2d 1272, 1288-1289 (7th Cir. 1983).

beyond Congress' power to regulate." *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*, 334 U.S. 219, 229-230 (1948). This Court's modern Commerce Clause cases expressly reject those unproductive attempts to identify which effects on commerce, while perceptible, are nonetheless "incidental," "indirect," or "remote." *Ibid.*; see also *Summit Health, Ltd.* v. *Pinhas*, 500 U.S. 322, 329 (1991) (requisite effect may be demonstrated "even though any actual impact on interstate commerce would be 'indirect' and 'fortuitous' "), quoting *Hospital Bldg. Co.* v. *Trustees of Rex Hospital*, 425 U.S. at 744; *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 783-786 (1975). "[T]he essence" of the modern rule is that the nature or degree of the impact is irrelevant to whether Congress may exercise its power to regulate an activity. *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*, 334 U.S. at 232. Rather, this Court's "cases have shown that, once an effect [on interstate commerce] is shown, no specific magnitude need be proved." *Goldfarb* v. *Virginia State Bar*, 421 U.S. at 785; see also *NLRB* v. *Denver Bldg. & Constr. Trades Council*, 341 U.S. 675, 684-685 (1951). Whether the effects established in a given case are labeled "slight," *United States* v. *Doherty*, 867 F.2d at 68, or "minimal," or "incidental," the important point is that they are perceptible and identifiable; nothing more is required by this Court's cases.

Aside from the doctrinal unsoundness of placing "incidental" effects on interstate commerce beyond the reach of congressional regulation, the Ninth Circuit's distinction between "minimal" and "incidential" effects on such commerce is vague and elusive. Because the interstate nexus requirement is an element

of the crime, on which the jury must be instructed in every RICO case, arcane distinctions between "minimal" and "incidental" effects on commerce can only lead to jury confusion and arbitrary results. The net effect will be to exclude from RICO's coverage cases such as this one, and others that a jury or court determines on a case-by-case basis are too distant from interstate commerce, without any adequate explanation or justification for those results.

Second, Alaska's geographical isolation is no reason for ruling that interstate shipments of supplies, materials, and personnel to that State do *not* affect interstate commerce. Not only would that reasoning needlessly impair the government's ability to enforce scores of important statutes in isolated areas of the country, but it is also logically perverse. This Court has recognized that the growth in the dimensions and complexity of our economy, and the resulting pervasive dependence of every State on the channels of interstate commerce, is precisely the justification for Congress to regulate activities previously thought to be purely local—"[a]s interstate commerce has become ubiquitous, activities once considered purely local have come to have effects on the national economy, and have accordingly come within the scope of Congress' commerce power." *New York* v. *United States*, 112 S. Ct. 2408, 2419 (1992); see also *Summit Health, Ltd.* v. *Pinhas*, 500 U.S. at 328-329. The Ninth Circuit's decision in this case turns that principle on its head. Under the Ninth Circuit's reasoning, the greater the dependence of a State on interstate commerce, the lesser the federal government's power to reach and regulate commercial activity occurring in that State. Neither logic nor precedent supports such an anomalous doctrine.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

JO ANN HARRIS
Assistant Attorney General

MICHAEL R. DREEBEN
Acting Deputy Solicitor General

MIGUEL A. ESTRADA
Assistant to the Solicitor General

DECEMBER 1994

APPENDIX

The Commerce Clause of the Constitution, Article I, Section 8, Clause 3, provides:

> The Congress shall have Power * * * [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

18 U.S.C. 1961 (1988 & Supp. V 1993) provides:

> As used in this chapter—
>
> (1) "racketeering activity" means (A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1029 (relating to fraud and related activity in connection with access devices), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1344 (relating to financial

institution fraud), sections 1461-1465 (relating to obscene matter), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1512 (relating to tampering with a witness, victim, or an informant), section 1513 (relating to retaliating against a witness, victim, or an informant), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), section 1956 (relating to the laundering of monetary instruments), section 1957 (relating to engaging in monetary transactions in property derived from specified unlawful activity), section 1958 (relating to use of interstate commerce facilities in the commission of murder-for-hire), sections 2251-2252 (relating to sexual exploitation of children), sections 2312 and 2313 (relating to interstate transportation of stolen motor vehicles), sections 2314 and 2315 (relating to interstate transportation of stolen property), section 2321 (relating to trafficking in certain motor vehicles or motor vehicle parts), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor

organizations) or section 501(c) (relating to embezzlement from union funds), (D) any offense involving fraud connected with a case under title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States, or (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act;

(2) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

(6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States,

a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate;

(7) "racketeering investigator" means any attorney or investigator so designated by the Attorney General and charged with the duty of enforcing or carrying into effect this chapter;

(8) "racketeering investigation" means any inquiry conducted by any racketeering investigator for the purpose of ascertaining whether any person has been involved in any violation of this chapter or of any final order, judgment, or decree of any court of the United States, duly entered in any case or proceeding arising under this chapter;

(9) "documentary material" includes any book, paper, document, record, recording, or other material; and

(10) "Attorney General" includes the Attorney General of the United States, the Deputy Attorney General of the United States, the Associate Attorney General of the United States, any Assistant Attorney General of the United States, or any employee of the Department of Justice or any employee of any department or agency of the United States so designated by the Attorney

General to carry out the powers conferred on the Attorney General by this chapter. Any department or agency so designated may use in investigations authorized by this chapter either the investigative provisions of this chapter or the investigative power of such department or agency otherwise conferred by law.

18 U.S.C. 1962 provides:

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law

or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1984 327147 20019

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether 18 U.S.C. § 1962(a) requires a particularized determination whether the activities of an enterprise had a substantial effect upon interstate commerce.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	v
OPINION BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT	2
SUMMARY OF ARGUMENT	4
ARGUMENT	6
I. THE ACTIVITIES OF RESPONDENT'S GOLD MINE DID NOT HAVE A SUBSTANTIAL EFFECT ON INTERSTATE COMMERCE AND ARE THEREFORE BEYOND THE REACH OF RICO	6
A. Under this Court's precedents, Congress's power to regulate activities affecting interstate commerce extends only to those activities which individually or as a class have a *substantial* effect on interstate commerce	6
1. Most regulations of activities "affecting commerce" are "class of activities" statutes that do not require a particularized inquiry into a party's effect on interstate commerce	8
2. General prohibitions require a particularized inquiry into the nexus between a party's activity and interstate commerce	10
3. RICO is not a "class of activities" statute	11

TABLE OF CONTENTS—Continued

	Page
4. Sherman Act cases provide the best model for the appropriate judicial inquiry	14
5. Petitioner posits a standard contrary to this Court's precedent in suggesting that the "effects" on interstate commerce under RICO are sufficient if they are "perceptible and identifiable"	17
B. The *activities* of respondent's gold mine did not substantially affect interstate commerce and are beyond the reach of RICO	20
II. THE EXPANSION OF FEDERAL JURISDICTION INTO AREAS HAVING MINIMAL CONNECTION WITH INTERSTATE COMMERCE IMPOSES SUBSTANTIAL COSTS ON THE FEDERAL-STATE BALANCE AND RIGHTS GRANTED UNDER STATE LAW	23
A. The "substantial effects" test serves to preserve the delicate balance between state and federal power	24
B. RICO is already an expansive statute reaching activities other than organized crime; an extension of jurisdiction would be unwarranted and unwise	25
C. Federalization of criminal law is destroying the balance between state and federal power	28
CONCLUSION	29

TABLE OF AUTHORITIES

CASES

	Page
Carter v. *Carter Coal Co.*, 298 U.S. 238 (1936)	7
F.C.C. v. *American Broadcasting Co.*, 347 U.S. 284 (1954)	26
Garcia v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985)	19, 26
Goldfarb v. *Virginia State Bar*, 421 U.S. 773 (1975)	17, 18
Gregory v. *Ashcroft*, 501 U.S. 452 (1991)	19, 20, 23, 24
Gulf Oil Corp. v. *Copp Paving Co.*, 419 U.S. 186 (1974)	10, 12
Hammes v. *AAMCO Transmissions, Inc.*, 33 F.3d 774 (7th Cir. 1994)	16
Heart of Atlanta Motel, Inc. v. *United States*, 379 U.S. 241 (1964)	8
Heille v. *City of St. Paul*, 671 F.2d 1134 (8th Cir. 1982)	15
Hodel v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981)	6, 8, 10
Holmes v. *Securities Investor Protection Corp.*, 112 S. Ct. 1311 (1992)	16, 17
Hospital Bldg. Co. v. *Trustees of Rex Hosp.*, 425 U.S. 738 (1976)	14, 22
Katzenbach v. *McClung*, 379 U.S. 294 (1964)	8, 9
Kolender v. *Lawson*, 461 U.S. 352 (1983)	13
Mandeville Island Farms v. *American Crystal Sugar Co.*, 334 U.S. 219 (1948)	14, 17
Maryland v. *Wirtz*, 392 U.S. 183 (1968)	8
McCulloch v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819)	6
McNally v. *United States*, 483 U.S. 350 (1987)	23
McLain v. *Real Estate Bd. of New Orleans, Inc.*, 444 U.S. 232 (1980)	8, 14, 15, 18
Moskal v. *United States*, 498 U.S. 103 (1990)	27
Musick v. *Burke*, 913 F.2d 1390 (9th Cir. 1990)	15
NLRB v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937)	7, 12
New York v. *United States*, 112 S. Ct. 2408 (1992)	27
Perez v. *United States*, 402 U.S. 146 (1971)	*passim*

TABLE OF AUTHORITIES—Continued

	Page
Polish Nat'l Alliance of the United States of N. Am. v. *NLRB*, 322 U.S. 643 (1944)	12, 23, 24
R.A.G.S. Culter, Inc. v. *Hyatt*, 774 F.2d 1350 (5th Cir. 1985)	18
Rewis v. *United States*, 401 U.S. 808 (1971)	26
Rose v. *Bartle*, 871 F.2d 331 (3d Cir. 1989)	18
Russell v. *United States*, 471 U.S. 858 (1985)	8, 13, 14
Schreiber Distrib. Co. v. *Serv-Well Furniture Co.*, 806 F.2d 1393 (9th Cir. 1986)	25
Sedima, S.P.R.L. v. *Imrex Co.*, 473 U.S. 479 (1985)	25
Shreveport Rate Cases, 234 U.S. 342 (1914)	18
Smith v. *Goguen*, 415 U.S. 566 (1973)	13
Stone v. *William Beaumont Hosp.*, 782 F.2d 609 (6th Cir. 1986)	15
Summit Health, Ltd. v. *Pinhas*, 500 U.S. 322 (1991)	15, 16
United States v. *Darby*, 312 U.S. 100 (1940)	7
United States v. *Local 560 (I.B.T.)*, 974 F.2d 315 (3d Cir. 1992)	17
United States v. *Lopez*, No. 93-2047	19
United States v. *McNinch*, 356 U.S. 595 (1958)	26
United States v. *Reese*, 92 U.S. 214 (1876)	13
United States v. *Robertson*, 15 F.3d 862 (9th Cir. 1994)	25
United States v. *Rone*, 598 F.2d 564 (9th Cir. 1979), *cert. denied*, 445 U.S. 946 (1980)	18, 19
United States v. *Wrightwood Dairy Co.*, 315 U.S. 110 (1942)	7, 12
Wickard v. *Filburn*, 317 U.S. 111 (1942)	8, 9, 12

STATUTES AND LEGISLATIVE MATERIALS

U.S. Const. art. I, § 8, cl. 3	2
15 U.S.C. § 1	10, 14
18 U.S.C. §§ 891 *et seq.*	2, 9
§ 1951	19
§§ 1961 *et seq.*	6, 11
§ 1962	*passim*
21 U.S.C. § 347	9

TABLE OF AUTHORITIES—Continued

	Page
§ 347a	9
§ 360	9
42 U.S.C. § 2000a	9
Pub. L. No. 87-781, § 301 (1962)	9
Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922	11
S. 2048, 90th Cong., 1st Sess. (1967)	17
Measures Relating to Organized Crime: Hearings on S. 30, S. 994 Before the Subcomm. on Criminal Laws and Procedure of the Senate Comm. on the Judiciary, 91st Cong., 1st Sess. 496 (1969)	11
115 Cong. Rec. 9567 (1969)	16

BOOKS AND JOURNALS

Philip E. Areeda & Herbert Hovenkamp, ANTITRUST LAW, ¶ 232.1c, 301-04 (1994 Supp.)	16
Stephen Calkins, *The 1990-91 Supreme Court Term and Antitrust*, 60 ANTITRUST L.J. 603 (1991)	16
THE FEDERALIST No. 45 (Charles A. Beard ed., 1948)	23

REPORTS AND MISCELLANEOUS MATERIALS

Conference of Chief Justices, Resolution IX (Feb. 10, 1994)	29
Judicial Conference of the United States, Federalization of State Prosecutions, Position of the Judicial Conference of the United States (Sept. 20, 1991)	28
National Governors Ass'n, HR-25 Policy (July 1994)	29
Ninth Circuit Judicial Conference, Mem. No. 4 (Aug. 1993)	29
Report of the Fed. Courts Study Comm. (Apr. 2, 1990)	28

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-251

UNITED STATES OF AMERICA,
Petitioner

v.

JUAN PAUL ROBERTSON

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF FOR RESPONDENT

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-36a) is reported at 15 F.3d 862 (9th Cir. 1994).

JURISDICTION

The judgment of the court of appeals was entered on February 1, 1994. The court of appeals denied a petition for rehearing on April 26, 1994. On July 15, 1994, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to August 24, 1994. The petition for a writ of certiorari was filed on August 10, 1994, and granted on October 17, 1994. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Commerce Clause of the Constitution, Article I, Section 8, Clause 3, provides: "The Congress shall have Power . . . to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

2. The pertinent provisions of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961 *et seq.*, are set forth in an appendix to this brief.

STATEMENT

1. On November 15, 1983, respondent Juan Paul Robertson, stole a Cadillac containing $980,000 and two kilograms of cocaine. In 1984, respondent and his wife purchased a home near Phoenix for $270,000 in cash. Pet. App. 3a; Tr. 61-76, 371-72. They also made additional large cash purchases totalling approximately $700,000. Pet. App. 3a; Tr. 383-405.

In 1985, respondent and Richard Horchler agreed as equal partners to buy mining claims in Alaska. Horchler negotiated the purchase of the claims for $125,000. He and a crew went to Alaska to begin work to make the claims operational. There, he purchased heavy equipment, including a bulldozer and frontloader, bought hand tools, and made arrangements to buy a generator. Respondent gave Horchler $85,000 for initial purchases and for salaries. Tom Black, a friend of respondent, purchased a small truck in Los Angeles and drove to Alaska with some of his tools to assist in setting up the mine. While in Alaska, Horchler and respondent agreed to name the mining operation "Double Eagle." The "Double Eagle" mining partnership lasted from June 20, 1985 until July 31, 1985, when it was dissolved. Thereafter, the mining operation became "Robertson Mining Company." A small quantity of gold was mined and sold in 1985. Tr. 825-36, 608-12, 909, 915, 1004-15, 2067.

In 1986, Tim Robertson, respondent's brother, and Boyce Clock drove the Cadillac to Alaska so that they could work with respondent and others at the mine. The Cadillac was wrecked after they arrived, and was inoperable at the mine. Respondent obtained his pilot's license in 1986, bought a plane, and used it to fly from Alaska. Tr. 757-58, 1720, 1904-05.

According to respondent's ex-wife, in 1986, she and respondent received a $300,000 loan secured by the house in Phoenix. Respondent allocated a portion of this loan for mine expenses. Approximately $200,000 of gold was sold by the mine. All of the purchasers were Alaskan refiners. Respondent kept about $30,000 of nuggets. *Id.* at 453-60, 782-83, 1906-07. In 1987, the mine was not profitable; and that year respondent gave the mine to his wife as part of their dissolution. *Id.* at 1985-86.

2. On October 17, 1991, respondent was indicted on eight narcotics and racketeering counts. A jury found respondent guilty on four narcotics counts and one count of investing racketeering proceeds in an enterprise, the activities of which affect interstate commerce, in violation of 18 U.S.C. 1962(a). Respondent was sentenced to concurrent terms of twenty years imprisonment on each of the five counts.

3. The court of appeals reversed respondent's RICO conviction and affirmed the narcotics convictions. Pet. App. 7a-10a. In a unanimous decision, the panel held that RICO's interstate nexus requirement was not satisfied because "the Government failed to establish that the RICO enterprise had anything more than an incidental effect on interstate commerce." *Id.* at 9a. The court noted that "none of the gold obtained from the mine was sold outside Alaska." *Id.* The court further found that "[t]he mine was a relatively small and entirely local operation." *Id.* The court rejected the Government's argu-

ment that respondent's use of an airplane and the Cadillac were sufficient to establish the requisite impact on interstate commerce. *Id.* at 10a. Evidence that some start-up funds originated in Arizona was similarly disregarded as not an activity of the enterprise. "There was no evidence introduced to show that the activities of the enterprise *itself* affected interstate commerce." *Id.* at 9a.

Judge Reinhardt, writing a special concurrence, expressed concern over the overcharging of respondent by the prosecution. "Rather than simply prosecuting the defendant on the basis of the overwhelming evidence of his illicit drug activity, the prosecutors . . . decided to turn the defendant's ownership of a gold mine into the centerpiece of his prosecution." *Id.* at 28a-29a. Judge Reinhardt stated that the "practice of overcharging a defendant involves an abuse of the prosecutor's generally unreviewable discretion." *Id.* at 29a-30a. He further noted that RICO "seems particularly susceptible to prosecutorial abuse, given that its scope is broad and somewhat ill-defined, and its penalties are severe." *Id.* at 32a.

The Government's petition for rehearing was denied and its suggestion for rehearing en banc was rejected without dissent on April 26, 1994.

SUMMARY OF ARGUMENT

Respondent was charged and convicted under 18 U.S.C. § 1962(a) which makes unlawful the investment of funds derived from a pattern of racketeering activity in an enterprise whose activities "affect[] interstate or foreign commerce." The activities of respondent's gold mine did not "affect" interstate commerce within the meaning of the statute.

A. Under this Court's precedents, congressional power to regulate activities affecting interstate commerce extends only to those activities which individually or when aggregated as a class have a "substantial effect" upon interstate commerce. If Congress sets out to regulate a particular industry or "class of activity," courts review Congress's determination that the cumulative effect of the activities of the industry or class has a substantial effect on interstate commerce. Neither the language of the RICO statute nor its legislative history demonstrates a congressional purpose to regulate a "class of activities." Rather, 18 U.S.C. § 1962(a), like the Sherman Act, is a general prohibition. Accordingly, under RICO the fact-finder must analyze the individual activities of the enterprise in question to determine whether they have a substantial effect on interstate commerce.

B. Applying the "substantial effect" standard and conducting a particularized inquiry compel the conclusion that respondent's gold mining enterprise had an insufficient nexus with interstate commerce under 18 U.S.C. § 1962(a). First, the sales of gold from the mine were only approximately $200,000 over a three-year period, and all the sales were made to refiners within Alaska. Second, the investment of monies in the mine and equipment in order to establish and sustain the operation is not an "activit[y] of [the mine] which affects[] interstate commerce." Third, the use of the telephones and mails is a concomitant but is not an activity of the mine as contemplated by the RICO statute. If such use were a sufficient "effect" on commerce, then federal laws like RICO and the Sherman Act would cover every imaginable form of economic activity.

C. The "substantial effect" standard and a rigorous particularized inquiry serve to preserve the delicate balance between state and federal power and to maintain the separation of powers. To apply a lesser standard would, in the case of RICO, result in an unwarranted federalization and proliferation of criminal and civil cases. In general, because other statutes, such as the Sherman Act, also base jurisdiction on effects upon commerce, it would result in a further overburdening of the federal courts.

ARGUMENT

I. THE ACTIVITIES OF RESPONDENT'S GOLD MINE DID NOT HAVE A SUBSTANTIAL EFFECT ON INTERSTATE COMMERCE AND ARE THEREFORE BEYOND THE REACH OF RICO.

Congress "can exercise only the powers granted to it" by the Constitution. *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 405 (1819). "[U]nlike the reserved police powers of the States, which are plenary unless challenged as violating some specific provision of the Constitution, the connection with interstate commerce is itself a jurisdictional prerequisite for any substantive legislation by Congress under the Commerce Clause." *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 311 (1981) (Rehnquist, J., concurring). Under the Commerce Clause, Congress can regulate (1) the channels of interstate commerce; (2) the instrumentalities of interstate commerce; and (3) activities affecting commerce. *Perez* v. *United States*, 402 U.S. 146, 150 (1971).

In the instant case, jurisdiction is asserted based upon the third category—activities affecting commerce. The Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961 *et seq.*, prohibits the investment of racketeering proceeds into an "enterprise . . . the activities of which affect[] interstate or foreign commerce." *Id.* § 1962(a). The issue here is the requisite "effect" on interstate commerce necessary to fall within the reach of RICO.

A. Under this Court's precedents, Congress's power to regulate activities affecting interstate commerce extends only to those activities which individually or as a class have a *substantial* effect on interstate commerce.

Petitioner urges the Court to hold that "perceptible and identifiable" effects upon interstate commerce are sufficient to confer jurisdiction under the Commerce Clause. Pet. Br. 25; see *infra* at Part I, A-5. This Court, however, has long held that the Commerce Clause grants Congress

the power to regulate activities "affecting commerce" only when they have a *substantial effect* on interstate commerce. In *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), the Court held that Congress could regulate labor relations at any manufacturing plant which had interstate sales. See *id.* at 40-42. *Jones & Laughlin* was issued less than one year after the Court struck down the application of the same statute to striking coal miners because mining was "manufacturing" not "commerce." See *Carter* v. *Carter Coal Co.*, 298 U.S. 238, 302 (1936). The *Jones & Laughlin* Court adopted a more expansive definition of "commerce," which emphasized the interconnected nature of the national economy, declaring that a work stoppage "would have a most *serious effect* upon interstate commerce." *Jones & Laughlin*, 301 U.S. at 41 (emphasis added). The requirement of a "serious effect" was necessary to counter the concern, as expressed by Chief Justice Hughes, that

> [t]he authority of the federal government may not be pushed to such an extreme as to destroy the distinction, which the commerce clause itself establishes, between commerce "among the several States" and the internal concerns of a state. That distinction between what is national and what is local in the activities of commerce is vital to the maintenance of our federal system.

Id. at 30.

In *United States* v. *Darby*, 312 U.S. 100 (1940), this Court stated, "But it does not follow that Congress may not by appropriate legislation regulate intrastate activities where they have a *substantial effect* on interstate commerce." *Id.* at 119 (citing *Santa Cruz Fruit Packing Co.* v. *NLRB*, 303 U.S. 453, 466 (1938)) (emphasis added). In *United States* v. *Wrightwood Dairy Co.*, 315 U.S. 110 (1942), Chief Justice Stone wrote that the commerce power "extends to those intrastate activities which in a *substantial way* interfere with or obstruct the exercise of

the granted power." *Id.* at 119 (emphasis added). Similarly, in *Wickard* v. *Filburn*, 317 U.S. 111 (1942), in an oft-quoted passage, the Court stated:

> even if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a *substantial economic effect* on interstate commerce, and this irrespective of whether such effect is what might at some earlier time have been defined as "direct" or "indirect."

Id. at 125 (emphasis added); see also *McLain* v. *Real Estate Bd. of New Orleans, Inc.*, 444 U.S. 232, 244 (1980); *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241, 258 (1964); *Katzenbach* v. *McClung*, 379 U.S. 294, 302 (1964); *Perez*, 402 U.S. at 151-52. The necessity of a "substantial effect" on interstate commerce was directly addressed by Justice Harlan who, writing for the Court in *Maryland* v. *Wirtz*, 392 U.S. 183 (1968), declared: "Neither here nor in *Wickard* has the Court declared that Congress may use a relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities." *Id.* at 196 n.27; see also *Hodel*, 452 U.S. at 309 (Rehnquist, J., concurring); *Russell* v. *United States*, 471 U.S. 858, 859 n.4 (1985) (referring to "all activity *substantially* affecting interstate commerce") (emphasis added) (citations omitted).

1. *Most regulations of activities "affecting commerce" are "class of activities" statutes that do not require a particularized inquiry into a party's effect on interstate commerce.*

Congress has exercised its power to regulate activities "affecting commerce" in two distinct ways. Typically, Congress has enacted statutes regulating an entire class of activities that in the aggregate has a substantial effect on interstate commerce. In some instances, however, Congress enacts a general prohibition, like the Sherman Act. In such general prohibitions, Congress writes a jurisdictional requirement into the text of the statute.

In 1942, this Court held that the production of a single wheat farmer was within the scope of federal regulation because "taken together with that of many others similarly situated" it had "a substantial influence on price and market conditions." *Wickard*, 317 U.S. at 128. Congress has relied on the "cumulative effect" principle of *Wickard* as its constitutional justification for the enactment of civil rights legislation;[1] regulatory measures affecting the sale of foods and additives;[2] a registration law for drug producers;[3] and criminal statutes.

For example, in Title II of the Consumer Credit Protection Act, 18 U.S.C. §§ 891 *et seq.*, Congress made explicit findings that extortionate credit transactions affect interstate commerce.[4] In interpreting the Act, this Court held that—based on legislative findings that loan-sharking in general substantially affected interstate commerce—Congress could make criminal any purely intrastate loan-sharking activity:

> Where the class of activities is regulated and that class is within the reach of federal power, the courts have no power "to excise as trivial, individual instances" of the class.

Perez, 402 U.S. at 154 (quoting *Wirtz*, 392 U.S. at 193).

---

[1] *See, e.g.*, 42 U.S.C. § 2000a, upheld in *Katzenbach* v. *McClung*, 379 U.S. 294, 305 (1964).

[2] *See, e.g.*, 21 U.S.C. §§ 347, 347a (oleomargarine).

[3] *See, e.g.*, 21 U.S.C. § 360; Public Law 87-781, § 301 (1962).

[4] Section 201(a) of Title II states in pertinent part: "Even where extortionate credit transactions are purely intrastate in character, they nevertheless directly affect interstate and foreign commerce." 18 U.S.C. § 891.

The judicial inquiry is relatively superficial when Congress has identified the activity or industry to be regulated, and findings (explicit or implicit) demonstrate a substantial effect on interstate commerce. "The court must defer to a congressional finding that a regulated activity affects interstate commerce, if there is any rational basis for such a finding." *Hodel*, 452 U.S. at 276.

Thus, in cases involving a "class of activities" statute, a court need find only that the party is a member of a class whose activities Congress could rationally have found have a substantial effect on interstate commerce. When interpreting such statutes, the "substantial effect" on interstate commerce is relatively easy to show because an entire industry or market will almost always have a substantial effect on interstate commerce.

2. General prohibitions require a particularized inquiry into the nexus between a party's activity and interstate commerce.

In contrast, the judicial inquiry is more rigorous and involves a particularized determination of fact when cases are brought under statutes containing general prohibitions, like the Sherman Act and RICO. Congress cannot possibly predetermine all the types of trade or enterprises intended to be covered by RICO or the Sherman Act. In such statutes, Congress has included a nexus element requiring proof that a particular activity or enterprise sufficiently affects interstate commerce. See 15 U.S.C. § 1; 18 U.S.C. § 1962. Congress leaves the nexus determination to be made by the courts on a case-by-case basis. As stated by this Court in *Gulf Oil Corp.* v. *Copp Paving Co.*, 419 U.S. 186 (1974):

> The jurisdictional inquiry under general prohibitions . . . like § 1 of the Sherman Act, turning as it does on the circumstances presented in each case and requiring a particularized judicial determination, differs *significantly* from that required when Congress itself has defined the specific persons and activities

> that affect commerce and therefore require federal regulation.

Id. at 197 n.12 (emphasis added).[5]

3. RICO is not a "class of activities" statute.

RICO is a general prohibition intended to cover a broad range of enterprises. The statute was enacted as Title IX of the Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 941. The "Statement of Findings and Purpose" that prefaced the Act declares Congress's concern with organized crime and its infiltration of legitimate businesses. Pub. L. No. 91-452, § 1, 84 Stat. 922-23; 18 U.S.C. § 1961. The legislative history lists a broad range of activities that had been overtaken by organized crime, including banking, construction, football, and restaurants. See *Measures Relating to Organized Crime: Hearings on S. 30, S. 994 Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess. 496 (1969) (Stmt. by Sen. McClellan).

Neither the "Statement of Findings and Purpose" nor the legislative history, including congressional findings, indicates that Congress intended to regulate a "class of activities."[6] The jurisdictional requirement that an "enterprise . . . affect interstate or foreign commerce" is a further indication that RICO is not a "class[] of activities"

---

[5] The *Perez* Court also noted the distinction, stating, " 'Congress has sometimes left it to the courts to determine whether the intrastate activities have the prohibited effect on the commerce, as in the Sherman Act. . . . And sometimes Congress itself has said that a particular activity affects the commerce . . . .' " *Perez* v. *United States*, 402 U.S. 146, 152 (1971) (quoting *United States* v. *Darby*, 312 U.S. 100, 120-21 (1940)).

[6] The Ninety-First Congress certainly was aware of its power to adopt a "class of activities" approach. Pub. L. No. 91-452, 84 Stat. 936—the same act that contains RICO—contains an explicit finding that illegal gambling has "an effect upon, interstate commerce . . . ." *Id.*

statute and that a determination as to whether there is a "substantial" effect on interstate commerce is to be made by the courts. *Cf. Gulf Oil,* 419 U.S. at 208.[7]

Petitioner argues that the gold mine is part of a "class of activities" that "in the aggregate substantially affects interstate or foreign commerce." Pet. Br. 21. Unlike *Perez* v. *United States,* 402 U.S. 146, 153-54 (1971) (class defined by Congress as loan-sharking activities), *Wickard* v. *Filburn,* 317 U.S. 111, 124-25 (1942) (class defined as wheat farmers), and *United States* v. *Wrightwood Dairy Co.,* 315 U.S. 110, 120 (1942) (class defined as intrastate milk market), petitioner can point to no identifiable class that Congress identified and sought to regulate by the enactment of RICO.

By arguing that RICO should be treated as a "class of activities" statute (Pet. Br. 19-21) and that the phrase "affecting interstate commerce" indicates Congress's intent to exercise its full power, petitioner appears to be proposing a "class" coterminous with the full reach of Congress's commerce power. This class would be comprised of all enterprises affecting interstate commerce into which racketeering funds could be invested. Such a class is far broader than the categories defined in traditional "class of activities" statutes. See *supra.* Such a broad class makes the act of defining a class meaningless. Moreover, a class with such an ill-defined boundary is particularly inappropriate for delineating criminal liability and would present the possibility of prosecutorial abuse.[8]

[7] Although the presence of a nexus element in the statute is a strong indicator of a general prohibition, there is at least one statute that contains findings *and* a nexus element requiring that the agency (the National Labor Relations Board) make a more particularized inquiry. *See Polish Nat'l Alliance of the United States of N. Am.* v. *NLRB,* 322 U.S. 643, 648 (1944). As petitioner notes, in that case the Court held that the Board should apply a "class of activities" approach. *Id.*; Pet. Br. 20 n.6. However, unlike the instant case, Congress set forth specific findings in the NLRB regarding the class of activities. *See NLRB* v. *Jones & Laughlin Steel Corp.,* 301 U.S. 1, 22 (1937) (discussing findings found at 29 U.S.C. § 151).

While petitioner also contends that the class of activity is the precious metal industry (Pet. Br. 21), RICO was not enacted for the purpose of protecting just this industry. It may be true that Congress can regulate gold mines through, for example, safety and environmental laws. It is very doubtful, however, that such laws were meant to extend the reach of RICO's civil and criminal provisions, the Sherman Act, and other general prohibitions. The question is not whether Congress has the power to regulate gold mines, but whether RICO's proceeds provision, 18 U.S.C. § 1962(a), reaches respondent's gold mine. The class of activities approach defers to a congressional determination about an industry or practice in the statute at issue; it does not allow prosecutors, juries, or courts to fill in the class of their choice.[9]

[8] *See Kolender* v. *Lawson,* 461 U.S. 352 (1983). In *Kolender* this Court recognized that the vagueness doctrine's "more important aspect" is its requirement that legislatures not permit arbitrary and discriminatory enforcement of criminal statutes by giving unbridled discretion to those who must apply them. *Id.* at 358. To permit the class of proscribed enterprises under § 1962(a) to be defined simply by reference to the full reach of the commerce power would create a net so large and indefinite that prosecutors, judges, and juries would be left free to step inside and pursue their own personal predilections without even minimal guidelines. *See generally Smith* v. *Goguen,* 415 U.S. 566, 575 (1973); *United States* v. *Reese,* 92 U.S. 214, 221 (1876). Judge Reinhardt expressed this concern in his special concurrence in this case. *See* Pet. App. 29a-32a.

[9] Petitioner relies on *Russell* v. *United States,* 471 U.S. 858 (1985). In *Russell,* the Court held that a federal anti-arson statute covering "any building . . . used . . . in any activity affecting interstate or foreign commerce" applied to an apartment building. *Id.* at 862 (quoting 18 U.S.C. § 844(i)). The Court, citing *Perez,* justified its holding by arguing that the commercial market in rental properties substantially affects interstate commerce. *Id.* The Court held the arson statute to be a class of activities statute,

4. *Sherman Act cases provide the best model for the appropriate judicial inquiry.*

The Sherman Act cases are an appropriate model for the type of particularized inquiry required when courts analyze the reach of a general prohibition like RICO. The Sherman Act prohibits activities "in restraint of trade or commerce among the several States." 15 U.S.C. § 1. Since 1948, this Court has held that this jurisdictional requirement is satisfied by a showing that the activities at issue in a particular case substantially affect commerce. *Mandeville Island Farms* v. *American Crystal Sugar Co.*, 334 U.S. 219, 234, 237 (1948). See also *McLain* v. *Real Estate Bd. of New Orleans, Inc.*, 444 U.S. 232, 242 (1980).

Courts reviewing a challenge to the Sherman Act's interstate commerce requirement have focused on the activity of the particular party before the court—not the activities of the entire industry to which that party belongs. For example, in *Hospital Building Co.* v. *Trustees of Rex Hospital*, 425 U.S. 738 (1976), this Court did not examine whether the hospital industry affected commerce, but rather whether defendants' alleged conspiracy had a substantial effect on interstate commerce. *Id.* at 744. Similarly, in *McLain*, the test was not whether the entire real estate brokerage industry affected interstate commerce.[10] Courts typically have focused either on the defendant's general business activities or the impact of

---

not a general prohibition like the Sherman Act. Indeed, the Court quoted from legislative history showing that Congress intended for the statute to cover almost all buildings except most private homes. *Id.* at 861 nn.6-7.

[10] In 1980, in *McLain* v. *Real Estate Board of New Orleans, Inc.*, 444 U.S. 232 (1980), this Court appeared to endorse both a focused inquiry into whether the particular restraint on trade had an effect on interstate commerce and a relatively broader inquiry into the impact of defendant's business activities on interstate commerce. *Id.* at 232, 242, 246.

defendant's alleged restraint on trade.[11] In order to find a Sherman Act violation, the activities at issue must " 'as a matter of practical economics' . . . have a not insubstantial effect on the interstate commerce involved." *McLain*, 444 U.S. at 246 (quoting *Hospital Bldg.*, 425 U.S. at 745).

Since 1980, a number of courts of appeal have held that Sherman Act defendants' business activities and/or the alleged conspiracy had an insufficient nexus with interstate commerce. The Eighth Circuit examined the activities of the defendant's trash collection business and held that the business did not substantially affect interstate commerce despite its purchase of out-of-state trucks and equipment. *Heille* v. *City of St. Paul*, 671 F.2d 1134 (8th Cir. 1982). In the precedent relied on by the Ninth Circuit in this case, the panel unanimously held that a mobile catering company's activities did not have a substantial "effect on interstate commerce." *Musick* v. *Burke*, 913 F.2d 1390, 1396 (9th Cir. 1990). The *Musick* Court held that the purchase of supplies and equipment from out of state, by itself, is an insufficient showing of interstate commerce nexus. *Id.* In one of the many cases involving doctor's privileges, the Sixth Circuit held that excluding a doctor from a local hospital has no more "than a de minimis impact on interstate commerce." *Stone* v. *William Beaumont Hosp.*, 782 F.2d 609, 614 (6th Cir. 1986).

In 1991, in *Summit Health*, this Court held that the denial of a doctor's privileges had a sufficient nexus with interstate commerce. *Summit Health, Ltd.* v. *Pinhas*, 500 U.S. 322, 331-32 (1991). Although the basis for the decision is not altogether clear, the *Summit Health* Court conducted a particularized inquiry into both the effect of

---

[11] *See infra* at pages 15-16 & notes 12-13 (discussing the alternative readings of *Summit Health, Ltd.* v. *Pinhas*, 500 U.S. 322 (1991)).

defendant's business activity and the effect of the alleged restraint.[12] The *Summit Health* Court noted that defendant was engaged in interstate commerce and that the conspiracy would affect the defendant's purchase of out-of-state medicine and supplies *and* the revenues from out-of-state insurance companies. *Id.* at 330. The Court further held that " 'as a matter of practical economics' there will be a reduction in the provision of ophthalmological services in the Los Angeles market." *Id.* at 331 (quoting *Hospital Bldg.*, 425 U.S. at 745).[13]

The Sherman Act is a particularly appropriate guide in RICO cases. The similarities between RICO and the Sherman Act go beyond their applicability to a broad range of enterprises. RICO was modeled, in part, on antitrust laws, "draw[ing] heavily upon the remedies developed in the field of antitrust." 115 Cong. Rec. 9567 (1969) (Senator McClellan's comments regarding S. 1861, which later became RICO). This Court has "repeatedly observed . . . that Congress modeled § 1964(c) on the civil-action provision of the federal antitrust laws." *Holmes* v. *Securities Investor Protection Corp.*, 112 S. Ct.

---

[12] *See* Philip E. Areeda & Herbert Hovenkamp, ANTITRUST LAW, ¶ 232.1c, 302-04 (1994 Supp.) (arguing that the Court could have decided *Summit Health* on the basis of the effect of defendant's activities or the effect of the conspiracy); Stephen Calkins, *The 1990-91 Supreme Court Term and Antitrust*, 60 ANTITRUST L.J. 603, 625-28 (1991) (same).

[13] *Summit Health* could also be read to endorse a class-of-activities approach. Such a reading has been criticized by Professor Areeda and the four dissenting justices. *See* Areeda & Hovenkamp, *supra* n.12, at 302; *Summit Health*, 500 U.S. at 333-34 (Scalia, J., dissenting); *see also* Calkins, *supra* n.12, at 625-26. Even if *Summit Health* is read to require a market-wide inquiry, this is uniquely appropriate to antitrust law. In a post-*Summit Health* decision, the Seventh Circuit held that it was the potential to incrementally cartelize markets that necessitated a broader inquiry. *Hammes* v. *AAMCO Transmissions, Inc.*, 33 F.3d 774, 781 (7th Cir. 1994); *see also* Areeda & Hovenkamp, *supra* n.12, at 304.

1311, 1317 (1992) (internal citations omitted). Indeed, the predecessor to RICO was proposed as an amendment to the Sherman Act. See S. 2048, 90th Cong., 1st Sess. (1967). In other contexts, courts have turned to antitrust standards to establish a test under RICO. See *Holmes*, 112 S. Ct. at 1317-18 (applying antitrust causation standards when interpreting RICO's treble damages provision); see also *United States* v. *Local 560 (I.B.T.)*, 974 F.2d 315, 332 (3d Cir. 1992) (applying antitrust injunction standards in a RICO case).

5. *Petitioner posits a standard contrary to this Court's precedent in suggesting that the "effects" on interstate commerce under RICO are sufficient if they are "perceptible and identifiable."*

As discussed at the outset, this Court has repeatedly required that activities regulated by Congress have a "substantial effect" on interstate commerce. Petitioner urges a standard of "perceptible and identifiable." Pet. Br. 25. If such a standard has applied at all, it has applied to an individual member of a class challenging the scope of a "class of activities" statute. In addition to citing "class of activities" cases, petitioner relies on two antitrust cases that do not support its proposed standard.

Petitioner relies on *Mandeville Island Farms* v. *American Crystal Sugar Co.*, 334 U.S. 219 (1948) and *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975) to argue that the effects on interstate commerce do not have to be "substantial" but that it is enough that they are "perceptible and identifiable." Pet. Br. 24-25. That is not the holding of those cases. In *Mandeville Island Farms*, this Court stated that "the vital question becomes whether the effect is sufficiently *substantial* and adverse to Congress' paramount policy declared in the Act's terms to constitute a forbidden consequence," 334 U.S. at 240 (emphasis added).[14] In *Goldfarb*, the Court stated that "[g]iven the

---

[14] Petitioner quotes *Mandeville Island Farms* v. *American Crystal Sugar Co.*, 334 U.S. at 232, for the proposition that " 'the essence'

substantial volume of commerce involved, and the inseparability of this particular legal service from the interstate aspects of real estate transactions, we conclude that interstate commerce has been sufficiently affected." *Goldfarb*, 421 U.S. at 785 (emphasis added) (internal footnote omitted). This Court, however, has held that *Goldfarb* was based on a "stream of interstate commerce" analysis rather than an "effect on commerce" test. Therefore, whatever the standard is in *Goldfarb*, it does not apply here. See *McLain* v. *Real Estate Bd. of New Orleans, Inc.*, 444 U.S. 232, 244 (1980).[15]

The difficulty in determining whether there has been a sufficient effect upon interstate commerce to satisfy the Commerce Clause has led many lower courts to conclude that virtually any activity connected with interstate commerce is sufficient. See Pet. Br. 18-19, and cases cited therein. As noted *supra*, however, this Court has repeatedly held that the connection with interstate commerce must be "substantial."[16] If Congress had intended

---

of the modern rule is that the nature or degree of the impact is irrelevant to whether Congress may exercise its powers to regulate an activity." Pet. Br. 25. The case does not stand for that proposition, but rather discusses the *Shreveport Rate Cases*, 234 U.S. 342 (1914), and states that the commerce power comprehends not only transportation but manufacturing that is linked to interstate commerce.

[15] Petitioner quotes *Goldfarb* v. *Virginia State Bar*, 421 U.S. 784, 785 (1975), as stating that, rather, this Court's "cases have shown that, once an effect [on interstate commerce] is shown, no specific magnitude need be proved." Pet. Br. 25.

[16] Petitioner cannot rely directly on Supreme Court authority for its proposed "perceptible and identifiable" effects test. For example, petitioner cites *Rose* v. *Bartle*, 871 F.2d 331, 356-57 (3d Cir. 1989), for the proposition that all that is required is a "minimal" interstate nexus. *Rose* relies on *R.A.G.S. Culter, Inc.* v. *Hyatt*, 774 F.2d 1350, 1353 (5th Cir. 1985), which in turn cites *United States* v. *Rone*, 598 F.2d 564, 573 (9th Cir. 1979), *cert. denied*, 445 U.S. 946 (1980). *Rone* refers to *Perez*, *supra*, to assert that a "minimal" nexus of the enterprise to interstate commerce satisfies the Commerce Clause. *Id.* at 573. *Perez* did not hold, however, that a "minimal" connection between the enterprise and interstate commerce satisfies the requirements of the Commerce Clause; rather, *Perez* held that Congress had a basis to determine that a "class of activities," loan sharking, affected interstate commerce and that the courts have no power " 'to excise, as trivial, individual instances' " of the class. *Perez* v. *United States*, 402 U.S. 146, 154 (1971) (quoting *Maryland* v. *Wirtz*, 392 U.S. 183, 193 (1968)).

to depart from its historical and traditional "substantial effect" requirement,[17] then it should have clearly spelled out the reach of the power that it intended to exercise. *Cf. Gregory* v. *Ashcroft*, 501 U.S. 452, 464 (1991); *United States* v. *Lopez*, No. 93-2047, Oral Argument Tr. 23.[18]

---

[17] Congress has written nexus elements that apparently have resulted in a less rigorous standard than "substantial effect." For example, the Hobbs Act covers "[w]hoever *in any way or degree* obstructs, delays or affects commerce or the movement of any article or commodity in commerce." 18 U.S.C. § 1951(a) (emphasis added). Petitioner argues that the Hobbs Act cases should govern here. However, the plain language of the nexus requirement in the Hobbs Act differs from that in the RICO statute and the standard developed in Hobbs Act cases should not be applied to RICO cases.

[18] The requirement that Congress speak plainly has its roots in the "constitutionally mandated balance of power" between state and national government which reflects the Founders' deliberate preference for decentralized government. *Garcia* v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528, 572 (1985) (Powell, J., dissenting). This "federalist structure of joint sovereigns" was intended by the Founders to "ensure the protection of 'our fundamental liberties' by preventing 'the accumulation of excessive power' by either." *Gregory* v. *Ashcroft*, 501 U.S. 452, 458 (1991) (quoting *Garcia*).

Under the Supremacy Clause, Congress has the power to significantly alter the "substantial sovereign powers" retained by the states under this constitutional structure of dual sovereigns. *Id.* at 461. To safeguard against the unnecessary erosion of state power, this Court has thus adopted the plain statement requirement as a rule of statutory construction. Federal legislation will not be construed to invade areas of traditional state sovereignty

B. The *activities* of respondent's gold mine did not substantially affect interstate commerce and are beyond the reach of RICO.

In order to make out a violation of 18 U.S.C. § 1962(a), there must be evidence that the activities of *the enterprise itself* substantially affected interstate commerce. It is immaterial whether the predicate racketeering activities affected interstate commerce.[19] It is immaterial whether the use or investment of income derived from these racketeering activities affected interstate commerce.[20] It is immaterial whether the acts involved in the acquisition or establishment of the enterprise by the use or investment of racketeering income affected interstate commerce. Yet, petitioner focuses almost exclusively upon the actions of respondent and others carried out during the acquisition and establishment of the mine or on actions ancillary to the activities of the mine (the mining and selling of gold).

---

unless the language of the statute makes it "absolutely certain," *id.* at 464, that Congress intended "to pre-empt the historic powers of the States," *id.* at 461, and "alter the usual constitutional balance of power." *Id.* at 460. This rule assures that Congress has "in fact faced, and intended to bring into issue" the question of the proper balance of power between state and federal governments. *Id.* at 461. In view of the numerous holdings of this Court that the words "affect interstate commerce" require a "substantial effect" it cannot be said that Congress made it "unmistakably clear" that it intended to reach insubstantial effects by using the "affects" language in RICO.

[19] As the court of appeals held in its opinion, "the Government must prove that the activities of the enterprise itself affect interstate commerce and not that each predicate act affects interstate commerce." Pet. App. 8a (citing *United States* v. *Bagnariol*, 665 F.2d 887, 892 (9th Cir. 1981), *cert. denied sub nom. Walgren* v. *United States*, 456 U.S. 962 (1982)).

[20] It is not the act of investing that must substantially affect interstate commerce. The "investment" required by the statute can be "direct or indirect[]" and can apply to the "establishment or operation." However, the "investment" is a separate element from the "enterprise," and the geographical origin of the investment is not the focus of the jurisdictional nexus inquiry.

Petitioner first argues that the mine's purchase of equipment and supplies, the hiring of employees from outside Alaska, and the purchase by respondent of an airplane to travel to and from Alaska as well as the transportation of a car from California to Alaska, are sufficient to prove that the gold mine's activities "affect[] interstate . . . commerce" within the meaning of section 1962(a). Pet. Br. 18. The majority of the equipment for the mine was purchased in Alaska. Tr. 902-03. Although the Cadillac was driven to Alaska in 1986, it was inoperable at the mine. Tr. 757-58. The airplane was flown out of Alaska by respondent in 1986, but there is no evidence that it was ever used in connection with the mine. 18 U.S.C. § 1962 (a) requires that the activities of the enterprise "affect interstate commerce."

If the factors relied upon by petitioner can somehow be viewed as activities of the mine, they are certainly trivial—not substantial—and should not provide a basis for RICO jurisdiction. Because virtually any business orders supplies, either directly or indirectly from another state, and has at least one employee who has driven a vehicle from another state at some point in time, to adopt petitioner's argument would be to hold that the activities of every business have a sufficient effect on interstate commerce to invoke the Commerce Clause. This was not the intent of Congress.

Petitioner next argues that the sale of approximately $200,000 of gold had a sufficient effect on interstate commerce. It should be noted that these sales occurred over a three-year period and were made to refiners within the state of Alaska. While petitioner refers to the amount of gold sold as "significant" (Pet. Br. 20), the court of appeals stated that "[t]he mine was relatively small and an entirely local operation, only producing approximately $200,000 in gold." Pet. App. 9a.

Relying on this Court's cases holding that the cumulative effect of individual activities can be used to satisfy

the commerce power, petitioner argues that "the intrastate sale of the mine's output clearly affected interstate and foreign commerce." Pet. Br. 21. Petitioner fails, however, to point to a discrete class, identified by either the RICO statute or by Congress in the legislative history of RICO, of which intrastate gold mining and sales are a part. See *supra* Part I A-3.

The court of appeals was correct in finding that none of the other activities referenced by petitioner were activities of the mine itsself. Petitioner argues that respondent's refinancing of his home in 1986 had an effect on interstate commerce since the purpose of refinancing was to raise operating expenses for the gold mine. Within the context of the real estate and credit market in Arizona, any effect was relatively trivial.[21] In addition, it was an activity of respondent relating to the use or investment of proceeds from racketeering activity and was not an activity of the enterprise which was involved in the mining and sale of gold as required under section 1962(a).

Finally, petitioner notes that the enterprise used the telephone and mails and contends that this is sufficient to satisfy a requisite effect on interstate commerce. Petitioner has not demonstrated that any phone calls or letters were activities of the enterprise.[22] Further, such slight or

[21] Petitioner relies on *Hospital Building Co.* v. *Trustees of Rex Hospital*, 425 U.S. 738 (1976), in asserting that out-of-state financing has an effect on interstate commerce. In that case, which involved the Sherman Act, the petitioner alleged a combination of several areas of interstate commerce in which respondent was involved: the purchase of up to eighty percent of its medicine and supplies from out-of-state sellers, a substantial number of patients coming from out of state, a large proportion of revenues coming from out-of-state insurance companies or from the federal government, a management service fee paid to its out-of-state parent company, *and* a large part of a planned four million dollar expansion to be financed through out-of-state lenders. No comparable combination of activity occurred here. *Id.* at 744.

[22] Although mail and telecommunications may furnish a basis for federal jurisdiction where they are used as "instruments of

trivial effects are insufficient to invoke Congress's commerce power. If petitioner's argument is correct, every economic activity and organization in the United States would have a sufficient effect on interstate commerce so as to qualify as an enterprise under RICO.

Respondent's mine was a small enterprise in Alaska which was not engaged in interstate commerce. Like all businesses, it had some incidental connections with interstate commerce. The totality of these connections cannot be considered "substantial" so as to conclude that the mine "affected" interstate commerce. As this Court has stated, "[s]cholastic reasoning may prove that no activity is isolated within the boundaries of a single State, but that cannot justify absorption of legislative power by the United States over every activity." *Polish Nat'l Alliance of the United States of N. Am.* v. *NLRB*, 322 U.S. 643, 650 (1944).

II. THE EXPANSION OF FEDERAL JURISDICTION INTO AREAS HAVING MINIMAL CONNECTION WITH INTERSTATE COMMERCE IMPOSES SUBSTANTIAL COSTS ON THE FEDERAL-STATE BALANCE AND RIGHTS GRANTED UNDER STATE LAW.

It is axiomatic that "[t]he Constitution created a Federal Government of limited powers." [23] *Gregory* v. *Ash-*

crime," *see, e.g., McNally* v. *United States*, 483 U.S. 350, 365 (1987) (internal quotation omitted), such is not the case here. The use of the mails and phones was a concomitant—not an activity—of the mine and did not facilitate any unlawful actions.

[23] James Madison wrote:

> The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. . . . The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties and properties of the people, and the internal order, improvement, and prosperity of the State.

THE FEDERALIST No. 45, at 202 (Charles A. Beard ed., 1948).

croft, 501 U.S. 457 (1991). The doctrine of federalism holds that many states may be firmly and permanently united under a strong central government endowed with large powers, and may at the same time retain liberty for their people and full autonomy in the management of internal affairs. The federalist system was designed to provide decentralized government which would foster innovation and experimentation by the States and involvement in the democratic processes by their citizens. Perhaps most important, "[t]he constitutionally mandated balance of power between the States and the Federal Government was adopted by the framers to ensure the protection of our fundamental liberties." *Id.* at 458 (Powell, J., dissenting) (internal quotations and citations omitted).

A. The "substantial effects" test serves to preserve the delicate balance between state and federal power.

Since the adoption of the Constitution, a constant tension has existed between the need for a strong national government on the one hand and the interests of the States, their citizens, and decentralized government on the other hand. This tension is reflected in the Court's jurisprudence during over 200 years of interpreting the Commerce Clause. With the transformation from an agrarian to a highly sophisticated and technological economy, the Commerce Clause has been used increasingly as a basis for federal legislation, including, of course, the enactment of criminal statutes. Nevertheless,

> the interpenetrations of modern society have not wiped out State lines. It is not for us to make inroads upon our federal system either by indifference to its maintenance or excessive regard for the unifying forces of modern technology.

Polish Nat'l Alliance of the United States of N. Am. v. *NLRB*, 322 U.S. 643, 650 (1944).

The "substantial effect" standard serves to preserve the delicate balance between state and federal power and to maintain the separation of powers. Maintaining some limit on the scope of Congress's regulatory power is necessary to prevent federalization of all imaginable activity. If mere use of the telephones and the mails brings an activity within Congress's reach, federal regulation also could cover babysitting, and jaywalking could be a federal crime.

Similarly, in the absence of a finding that Congress intended to regulate a class of activities, a rigorous judicial inquiry regarding jurisdiction should be required. Some deference to congressional determinations is due, but when Congress leaves the jurisdictional inquiry to the fact-finder that determination should be individualized. This is particularly true when a defendant's liberty is at stake.

B. RICO is already an expansive statute reaching activities other than organized crime; an extension of jurisdiction would be unwarranted and unwise.

RICO's definitions of "pattern" and "enterprise" are already extremely broad. An expansive reading of RICO's jurisdictional requirement would not only be legally unjustified, but would also be unwise as a practical matter. It has been widely recognized that RICO covers far more than organized crime. With its civil provisions, RICO reaches garden variety commercial disputes.[24] With its criminal provisions, RICO reaches persons like respondent who should have been charged only with the narcotics counts. See *United States* v. *Robertson*, 15 F.3d 862

---

[24] The actual and potential proliferation of civil RICO cases has been repeatedly acknowledged. *See, e.g., Sedima, S.P.R.L.* v. *Imrex Co.*, 473 U.S. 482, 503-04 (1985) (Marshall, J., dissenting); *Schreiber Distrib. Co.* v. *Serv-Well Furniture Co.*, 806 F.2d 1393, 1402 (9th Cir. 1986) (Kennedy, J., concurring). Civil plaintiffs are not always constrained by either guidelines or scarcity of resources, as is the case with criminal prosecutors.

(9th Cir. 1994); Pet. App. 29a-32a (Reinhardt, J., concurring).

Petitioner urges an interpretation of the Commerce Clause that would enhance "a real risk that Congress will gradually erase the diffusion of power between State and Nation on which the Framers based their faith in the efficiency and vitality of our Republic." *Garcia* v. *San Antonio Metro. Transit Auth.*, 469 U.S. 581, 584 (1985) (O'Connor, J., dissenting). Under petitioner's interpretation of the Commerce Clause, any federal prosecutor or any civil plaintiff can bring an action under RICO if there is a "pattern" of racketeering activity with subsequent investment in an "enterprise" where the "enterprise" makes as little as one phone call to another state. In general, virtually any activity would be subject to the power. Almost any private activity has some ultimate theoretical effect on interstate commerce. For example, a jaywalker presents the possibility of an automobile accident which will bring into play insurance companies which do business across state lines. Under petitioner's argument, the cumulative effect of jaywalking would give Congress the power to make jaywalking a federal offense.[25]

[25] Petitioner argues that Congress intended RICO to have a broad scope and to effectuate this purpose provided that "[t]he provisions of RICO shall be liberally construed to effectuate its remedial purposes." Pet. Br. 13-14 (quoting Pub. L. No. 91-452, § 904(a), 84 Stat. 947). This ignores the fact that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Rewis* v. *United States*, 401 U.S. 809, 812 (1971) (citing *Bell* v. *United States*, 349 U.S. 81, 83 (1955)). Although RICO is both a criminal and civil statute, it must be strictly interpreted. *Cf. F.C.C.* v. *American Broadcasting Co.*, 347 U.S. 284, 296 (1954); *United States* v. *McNinch*, 356 U.S. 595, 598 (1958). The rule of lenity:

> is founded on two policies that have long been part of our tradition. First, a "fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear." *McBoyle* v. *United States*, 283 U.S. 25, 27 (1931) (Holmes, J.). . . . Second, because of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity. This policy embodies "the instinctive distaste of men languishing in prison unless the lawmaker has clearly said they should." H. Friendly, Mr. Justice Frankfurter and The Reading of Statutes, in Benchmarks, 196, 209 (1967).

Moskal v. *United States*, 498 U.S. 103, 131 (1990) (Scalia, J., dissenting) (quoting *United States* v. *Bass*, 404 U.S. 336, 347-49 (1971)).

Respondent is well aware of the concern in this country about organized crime and its effects. See Pet. Br. 15-16. The fact that organized crime may be pervasive, however, does not mean that the Commerce Clause has unlimited scope. In addition, a clear and confined scope is particularly appropriate in the ever-increasing number of federal criminal statutes. As this Court recently held:

> [T]he Constitution protects us from our own best intentions: It divides power among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day.

New York v. *United States*, 112 S. Ct. 2408, 2434 (1992).

Almost a quarter of a century ago, Justice Stewart presciently stated:

> In order to sustain this law we would, in my view, have to be able at the least to say that Congress could rationally have concluded that loan sharking is an activity with interstate attributes that distinguish it in some substantial respect from other local crime. But it is not enough to say that loan sharking is a national problem, for all crime is a national problem. It is not enough to say that some loan sharking has interstate characteristics, for any crime may have an interstate setting. In the circumstance that loansharking has an adverse impact on inter-

> state business is not a distinguishing attribute, for interstate business suffers from almost all criminal activity, be it shoplifting or violence in the streets.

Perez v. *United States*, 402 U.S. 146, 157-58 (1971).

C. Federalization of criminal law is destroying the balance between state and federal power.

The Judicial Conference of the United States and various federal circuit judicial conferences have issued resolutions expressing concern about the effect of the expansion of federal criminal jurisdiction upon the very structure of federalism.[26] In 1991, the United States Judicial Conference opposed a proposed law which would define as a federal crime violent felonies involving handguns. The Conference said: "[s]uch expansion of federal jurisdiction would be inconsistent with long-accepted concepts of federalism and would ignore the boundaries between appropriate state and federal action." *Judicial Conference of the United States, Federalization of State Prosecutions, Position of the Judicial Conference of the United States* (Sept. 20, 1991). The Ninth Circuit Judicial Conference declared in 1993 that:

> The increased federalization of traditional state law crimes by the Congress has a far-reaching impact on our conceptual ideal of the complementary roles of state and federal courts. Such actions by Congress

---

[26] This expansion of federal criminal law has also affected the performance of the courts. According to the Federal Courts Study Committee,

> [t]he deterioration in the indices of federal judicial performance has been gradual, but the expanded federal effort to reduce drug trafficking has led to a recent surge in federal criminal trials that is preventing judges in larger metropolitan areas from scheduling civil trials, especially civil jury trials, of which there is now a rapidly growing backlog. It appears that the long expected crisis of the federal courts . . . is at last upon us.

Report of the Fed. Courts Study Comm., at 4-5 (Apr. 2, 1990).

> evince a lack of respect and faith in the ability of the states to handle their affairs, and places an unreasonable burden on the much smaller federal court system to handle expanding criminal dockets.

Ninth Circuit Judicial Conference, Mem. No. 4 (Aug. 1993).

Federal courts are not alone in their concern about expansive federal criminal jurisdiction. The Conference of Chief Justices, comprised of state, territorial, and commonwealth judicial officials, adopted a resolution prompted by the Senate's recent crime bill which stated, *inter alia*, that the Conference "strongly opposes federal action which, contrary to the principles of federalism and historical experience, would have the pernicious effect of federalizing state criminal law and procedure . . . . *Conference of Chief Justices*, Resolution IX (Feb. 10, 1994). Most recently, the National Governors Association declared "that some attempts to expand federal criminal law in traditional state functions . . . could undermine state and local anti-crime efforts," and "urge[d] legislators to pursue policies that recognized rather than erode[d] the state's role on the chief planners and administrators of criminal justice programs." *National Governors Ass'n*, HR-25 Policy (July 1994).

The activities of respondent's gold mine had far less effect on interstate commerce than most businesses. To hold that the mine's activities constituted a sufficient connection with interstate commerce to satisfy the jurisdictional requirement of RICO would be yet another step in the disruption of the traditional federal-state balance and in the formation of a truly national police power.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

GLENN STEWART WARREN
(Appointed by this Court)
2442 Fourth Avenue
San Diego, California 92101
(619) 236-8058
Counsel for Respondent

APPENDIX

18 U.S.C. § 1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

(Added Oct. 15, 1970, P. L. 91-452, Title IX, § 901(a), 84 Stat. 942; Nov. 18, 1988, P. L. 100-690, Title VII, Subtitle B, § 7033, 102 Stat 4398.)

(7)

No. 94-251

FILED
FEB 10 1995
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1994

UNITED STATES OF AMERICA, PETITIONER

v.

JUAN PAUL ROBERTSON

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

DREW S. DAYS, III
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

BEST AVAILABLE COPY

16 pp

TABLE OF AUTHORITIES

Cases:	Page
Allied-Bruce Terminix Cos. v. *Dobson*, No. 93-1001 (Jan. 18, 1995)	2
Chapman v. *United States*, 500 U.S. 453 (1991)	11
Fort Wayne Books, Inc. v. *Indiana*, 489 U.S. 46 (1989)	11
Gregory v. *Ashcroft*, 501 U.S. 452 (1991)	12
Gulf Oil Corp. v. *Copp Paving Co.*, 419 U.S. 186 (1974)	7
Hammer v. *Dagenhart*, 247 U.S. 251 (1918)	9
Harrison v. *PPG Industries, Inc.*, 446 U.S. 578 (1980)	13
Hodel v. *Virginia Surface Mining & Recl. Ass'n*, 452 U.S. 264 (1981)	13
Kolender v. *Lawson*, 461 U.S. 352 (1983)	10
McLain v. *Real Estate Board of New Orleans*, 444 U.S. 232 (1980)	3
NLRB v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937)	6
NLRB v. *Reliance Fuel Oil Corp.*, 371 U.S. 224 (1963)	2, 4
Perez v. *United States*, 402 U.S. 146 (1971)	7
Perrin v. *United States*, 444 U.S. 37 (1979)	12
Polish National Alliance v. *NLRB*, 322 U.S. 643 (1944)	3, 4, 6, 11
Reves v. *Ernst & Young*, 113 S. Ct. 2050 (1993)	11
Russell v. *United States*, 471 U.S. 858 (1985)	2, 4, 5
Scarborough v. *United States*, 431 U.S. 563 (1977)	8, 11, 12
Smith v. *United States*, 113 S. Ct. 2050 (1993)	11
Summit Health, Ltd. v. *Pinhas*, 500 U.S. 322 (1991)	2, 3, 6
United States v. *Bass*, 404 U.S. 336 (1971)	8
United States v. *Culbert*, 435 U.S. 371 (1978)	5, 10, 12
United States v. *Darby*, 312 U.S. 100 (1941)	9
United States v. *Doherty*, 867 F.2d 47 (1st Cir.), cert. denied, 492 U.S. 918 (1989)	8, 9
United States v. *Feola*, 420 U.S. 671 (1975)	10

Cases—Continued: Page

United States v. *Frankfort Distilleries, Inc.*, 324 U.S. 293 (1945) 2
United States v. *Staszcuk*, 517 F.2d 53 (7th Cir.), cert. denied, 423 U.S. 837 (1975) 6, 7
United States v. *South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944) 10
United States v. *Turkette*, 452 U.S. 576 (1981) 12
United States v. *X-Citement Video, Inc.*, 115 S. Ct. 464 (1994) 10
United States v. *Yermian*, 468 U.S. 63 (1984) 10
Wickard v. *Filburn*, 317 U.S. 111 (1942) 9

Constitution and statutes:

U.S. Const. Art. I, § 8, Cl. 3 (Commerce Clause) 1, 2, 4, 5, 6, 8, 10, 13
Hobbs Act, 18 U.S.C. 1951 ..... 5, 10
National Labor Relations Act, 29 U.S.C. 152(7) 3, 6
Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 1, 84 Stat. 922-923 ..... 6, 7
§ 904(a), 84 Stat. 947 11
Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1961 *et seq.* ..... *passim*
18 U.S.C. 1961 note 6, 11
Sherman Act, 15 U.S.C. 1 ..... 2, 3, 6, 10
18 U.S.C. 844(i) 4

Miscellaneous:

H.R. Rep. No. 1549, 91st Cong., 2d Sess. (1970) 2
S. Rep. No. 617, 91st Cong., 1st Sess. (1969) 7

In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-251

UNITED STATES OF AMERICA, PETITIONER

v.

JUAN PAUL ROBERTSON

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

Respondent's central contention (Br. 10-11) is that the phrase "affecting commerce" does not invoke Congress's full power under the Commerce Clause, because it does not trigger application of a "class of activities" analysis. According to respondent (Br. 8-11), only when Congress itself specifies the class of activities that a statute regulates may courts consider the *aggregate* effect on commerce of the class's activities. When Congress does not explicitly invoke the "class of activities" doctrine, the statute requires that the activities in each case, considered in isolation, be "substantial." Respondent thus proposes that the "affecting commerce" rubric be reduced from its current position as invoking all of Congress's Commerce Clause authority to a middle

ground of uncertain scope "lying somewhere in a no-man's land between 'in commerce' and [a class-of-activities analysis]." *Allied-Bruce Terminix Cos.* v. *Dobson*, No. 93-1001 (Jan. 18, 1995), slip op. 9. That result would have the effect of "unnecessarily complicating the law and breeding litigation," *ibid.*, and is not supported by this Court's cases.

1. As this Court recently reaffirmed, the phrase "affecting commerce," which Congress used to describe the jurisdictional reach of RICO, is a term of art that signals Congress's "intent to exercise its Commerce Clause powers to the full." *Allied-Bruce Terminix Cos.* v. *Dobson*, slip op. 7 (citing *Russell* v. *United States*, 471 U.S. 858, 859 (1985)). Congress used that phrase in RICO with full awareness that it was invoking "the fullest jurisdictional breadth constitutionally permissible under the Commerce Clause." H.R. Rep. No. 1549, 91st Cong., 2d Sess. 70 (1970) (quoting *NLRB* v. *Reliance Fuel Oil Corp.*, 371 U.S. 224, 226 (1963) (per curiam) (emphasis deleted)). See U.S. Br. 13-16. Contrary to respondent's contention (Br. 8-10), the class-of-activities analysis applies whenever Congress chooses to use its full constitutional authority; that analysis is simply a way to determine whether a particular activity affects commerce when measured by the full authority of Congress.

Respondent proposes (Br. 14-17) the Sherman Act, 15 U.S.C. 1, as a "model" for the jurisdictional inquiry under RICO. This Court has repeatedly emphasized, however, that "Congress, in passing the Sherman Act, left no area of its constitutional power unoccupied; it 'exercised all the power it possessed.'" *United States* v. *Frankfort Distilleries, Inc.*, 324 U.S. 293, 298 (1945); see also *Summit Health, Ltd.* v. *Pinhas*, 500 U.S. 322, 328-329 & n.10 (1991). And the "line of business" approach

that this Court has endorsed in Sherman Act cases necessarily looks beyond the activities of the parties immediately before the Court. See, *e.g.*, *Summit Health, Ltd.* v. *Pinhas*, 500 U.S. at 332 (competitive significance of conduct "must be measured, not just by a particularized evaluation of [plaintiff's] own practice, but rather, by a general evaluation of the impact of the restraint on other participants and potential participants in the market from which he has been excluded"); *McLain* v. *Real Estate Board of New Orleans*, 444 U.S. 232, 242-243 (1980) (plaintiff need not prove that the challenged illegal practice, by itself, affected commerce). Indeed, respondent concedes that the Court's analysis in *Summit Health*, *supra*, "could be read to endorse a class-of-activities approach" in assessing the jurisdictional reach of the Sherman Act. Br. 16 n.13. To avoid that suggestion, respondent is compelled to argue that the approach of the Sherman Act cases—the "model" he proposes—should *not* be followed in interpreting RICO, because that approach "is uniquely appropriate to antitrust law." *Ibid.*

Contrary to respondent's argument that "the individual activities of the [RICO] enterprise" must be viewed in isolation (Br. 5), this Court's cases have applied the class-of-activities analysis to other statutes that (like RICO and the Sherman Act) involve "general prohibitions" (Br. 10). In *Polish National Alliance* v. *NLRB*, 322 U.S. 643 (1944), for example, the Court held that certain practices were proscribed by the National Labor Relations Act, 29 U.S.C. 152(7), because they "tend[ed] to lead to a labor dispute burdening or obstructing commerce." 322 U.S. at 648. In so holding, the Court first noted that when Congress legislates with respect to activities that "affect" or "obstruct" commerce, it manifests its purpose to bring those activities

"within the full sweep of its constitutional authority." 322 U.S. at 647. The Court then explained that while "Congress * * * left it to the Board to ascertain whether proscribed practices would in particular situations adversely affect commerce when judged by the full reach of the constitutional power," that question "is not to be determined by confining judgment to the quantitative effect of the activities immediately before the Board. Appropriate for judgment is the fact that the immediate situation is representative of many others throughout the country, the total incidence of which if left unchecked may well become far-reaching in its harm to commerce." *Id.* at 648. The Court made the same point (and quoted from *Polish National Alliance* at length) in *NLRB* v. *Reliance Fuel Oil Corp.*, 371 U.S. at 226-227, the case that was cited in the House Report that accompanied RICO to illustrate the constitutional significance of the phrase "affecting commerce." H.R. Rep. No. 1549, *supra*, at 70.

More recently, the Court applied the same "class-of-activities" analysis in *Russell* v. *United States*, 471 U.S. 858 (1985). The defendant in that case attempted to set fire to a two-unit apartment building. He was convicted under 18 U.S.C. 844(i), which prohibits the arson or attempted arson of any building "used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce." That statute, like RICO, requires that a nexus with commerce be proven in each prosecution. This Court nonetheless unanimously affirmed the conviction, rejecting the defendant's claim that the building he attempted to burn did not "affect[] interstate or foreign commerce." The Court explained that the phrase "affecting commerce" expresses Congress's intent "to exercise its full power under the Commerce Clause," 471 U.S. at 859 & n.4, and noted that

the government had established that the defendant used the building as rental property. *Id.* at 859, 862. Because "the local rental of an apartment unit is merely an element of a much broader commercial market in rental properties," and because Congress has the power "to regulate the class of activities that constitute the rental market for real estate," the Court concluded that the property "was * * * being used in an activity affecting commerce." *Id.* at 862.[1]

The lower courts have applied the same analysis to the Hobbs Act, 18 U.S.C. 1951, which also extends to the limits of the Commerce Clause in prohibiting any extortion that obstructs or affects commerce, see, *e.g.*, *United States* v. *Culbert*, 435 U.S. 371, 373 (1978), and which also requires that the jurisdictional nexus be proved in every case. As Justice Stevens explained in language that is equally applicable to the concerns that prompted the enactment of RICO:

> [C]ongressional concern was not merely a matter of providing federal protection to each of the "relatively small shops" being victimized, but rather reflected the legislative judgment that these entrepreneurs, in the aggregate, represented a component of industry of sufficient importance to merit federal protection. The concern which gave rise to the statute is marketwide. Thus, although enforcement necessarily proceeds on a case-by-case basis, our evaluation of both the intent of Congress and its power to implement that intent, requires more than a

---

[1] *Russell* also disposes of respondent's suggestion that a class-of-activities analysis is possible only when Congress itself defines a *specific* "industry or practice in the statute at issue." Br. 13. The statute at issue in *Russell* did not specify the rental market, or any other industry, as the relevant "class."

> consideration of the consequences of the particular transaction disclosed by this record; it requires an identification of the consequences of the class of transactions of which this is but one example.

United States v. *Staszcuk*, 517 F.2d 53, 57-58 (7th Cir.) (en banc), cert. denied, 423 U.S. 837 (1975), cited with approval in *Summit Health, Ltd.* v. *Pinhas*, 500 U.S. at 331 n.11. A statute that serves such purposes, "[l]ike the Sherman Act, * * * parallels the central purpose of the Commerce Clause itself" and therefore "must receive an expansive construction." 517 F.2d at 58.

Respondent attempts to distinguish *Polish National Alliance*, *supra*, on the ground that "Congress set forth specific findings" before it enacted the National Labor Relations Act (NLRA). Br. 12 n.7. Respondent cites no authority that requires Congress to make "specific findings" in the manner of an administrative agency (and he elsewhere contends that the requisite findings may be "explicit or implicit," Br. 10). In any event, the "specific findings" supporting the NLRA were simply to the effect that strikes and other forms of industrial strife tend to impede commerce. See *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 22-23 & n.2 (1937). The Statement of Findings and Purpose that prefaced RICO is, at least, as "specific." See Pub. L. No. 91-452, § 1, 84 Stat. 922-923, 18 U.S.C. 1961 note. Congress there made quite clear its view that the illegal activities of organized crime "annually drain[] billions of dollars from America's economy," that the money "is used to infiltrate and corrupt legitimate business," and that those activities "weaken the stability of the Nation's economic system, harm innocent investors and competing organizations, interfere with free competition, seriously burden interstate and foreign commerce, threaten the

domestic security, and undermine the general welfare of the Nation and its citizens." *Ibid.*

Respondent contends that, unlike RICO, the statute at issue in *Russell is* a class-of-activities statute, because the legislative history indicated that Congress "intended for the statute to cover almost all buildings." Br. 13-14 n.9. That does not distinguish RICO, however, since Congress intended to cover all "enterprises," and, as we have demonstrated (U.S. Br. 14-16), was particularly concerned about the "small or marginal businessman who is most easily subject to invasion by organized crime." S. Rep. No. 617, 91st Cong., 1st Sess. 77 (1969).

Finally, respondent relies (Br. 10-11) on the Court's statement in *Gulf Oil Corp.* v. *Copp Paving Co.*, 419 U.S. 186, 197 n.12 (1974), that when Congress requires proof of a nexus with commerce in each case, the jurisdictional inquiry "differs significantly from that required when Congress itself has defined the specific persons and activities that affect commerce." The difference in the inquiry, however, does not assist respondent. When Congress defines the regulated class in the statute, it dispenses with the need for *any* proof of a nexus with interstate commerce in the specific case. See, *e.g.*, *Perez* v. *United States*, 402 U.S. 146 (1971), cited by *Gulf Oil Corp.* v. *Copp Paving Co.*, 419 U.S. at 197 n.12. That is not so when Congress uses the term of art "affecting commerce," but the nexus to commerce in a particular case may still be established by any permissible means of invoking Congress's commerce power, including the class-of-activities analysis. See, *e.g.*, *United States* v. *Staszcuk*, 517 F.2d at 59-60 (while courts may not "disregard the statutory language which requires the prosecutor to prove some connection with interstate commerce in every case," jurisdiction "is

justified by the harmful consequences of the class of transactions to which the individual extortion belongs").

2. In this case, contrary to respondent's claim (Br. 20-23), the evidence readily established that the Alaskan gold mine (the RICO "enterprise") into which respondent invested racketeering proceeds had the requisite effect on commerce. First, the activities of the mine used the channels of interstate commerce. See *Scarborough* v. *United States*, 431 U.S. 563, 571, 575, 577 (1977) (statute outlawing possession of firearm "in commerce or affecting commerce" satisfied when firearm was, "at some time, in interstate commerce," even if that occurred before the defendant acquired it; Congress's use of the phrase "affecting commerce" invokes full Commerce Clause power and makes clear that it "intended no more than a minimal nexus requirement"); *United States* v. *Bass*, 404 U.S. 336, 350 (1971) (same, with respect to felon's receipt of a gun "in or affecting commerce"). As we have demonstrated (U.S. Br. 18-19, 22-23), respondent's gold mine purchased equipment and hired employees outside of Alaska, and used the interstate mails and the wires to receive directions and monetary support from respondent. Nothing more was required to meet the requirements of RICO and the Commerce Clause. As the court explained in *United States* v. *Doherty*, 867 F.2d 47, 68 (1st Cir.) (Breyer, J.), cert. denied, 492 U.S. 918 (1989), the "minimal" effect on commerce demanded by RICO is satisfied by any use of the channels of interstate commerce, such as when "supplies used [by the enterprise] originated out of state," when "interstate telephone calls" were placed by the enterprise, or when

the activities of the enterprise prevented out-of-state job applicants from being hired by an employer.[2] *Ibid.*

Second, the jurisdictional requirement of RICO was independently satisfied in this case by the gold mine's *intrastate* activities (*i.e.*, its sale of at least $200,000 in gold), because they were part of a class of activities that in the aggregate substantially affects commerce. See, *e.g. Wickard* v. *Filburn*, 317 U.S. 111, 127-128 (1942). Respondent does not dispute that, considered in the aggregate with like activities across the country, the activities of his gold mine affected commerce. Br. 10. Nor does he dispute that the practical consequence of the "class of activities" analysis is that Congress may constitutionally regulate even "trivial" instances of the class. *Id.* at 9. Because, contrary to respondent's claim (Br. 22), Congress need not define the regulated class in the statute to justify the use of the "class of activities" analysis, the jurisdictional nexus to interstate commerce was satisfied in this case by the aggregate

---

[2] Respondent asserts that the mail and telecommunications may not support federal jurisdiction unless "they are used as instruments of crime." Br. 22 n.22 (internal quotation marks omitted). He cites no authority, however, for the proposition that Congress may regulate an activity based on its employment of the mail or telephones only when those means of communications are used for criminal purposes. This Court's cases are to the contrary. See, *e.g.*, *United States* v. *Darby*, 312 U.S. 100, 113-115 (1941). Indeed, respondent's argument recalls the reasoning of *Hammer* v. *Dagenhart*, 247 U.S. 251 (1918), where the Court held that "Congressional power to prohibit interstate commerce is limited to articles which in themselves have some harmful or deleterious property." *United States* v. *Darby*, 312 U.S. at 116. As this Court explained in *Darby* (when it overruled *Dagenhart*), that "distinction * * * was novel when made and unsupported by any provision of the Constitution—[it] has long since been abandoned." *Ibid.*

commercial impact of the gold mining industry that encompasses respondent's mine.

3. Respondent also contends that a broad jurisdictional nexus is "inappropriate for delineating criminal liability and would present the possibility of prosecutorial abuse," because it could render the statute void-for-vagueness under due process standards. Br. 12-13 (citing *Kolender* v. *Lawson*, 461 U.S. 352 (1983)). RICO, however, is not the first statute in which Congress has exercised its full authority under the Commerce Clause in the criminal context. See, *e.g.*, *United States* v. *Culbert*, *supra* (Hobbs Act); *United States* v. *South-Eastern Underwriters Association*, 322 U.S. 533 (1944) (Sherman Act); *United States* v. *Darby*, 312 U.S. 100 (1941) (Fair Labor Standards Act). Yet this Court has never suggested that a broad jurisdictional reach raises vagueness concerns. A vagueness argument is particularly misplaced, because federal criminal statutes generally do not require that the defendant harbored "anti-federal scienter." *United States* v. *Staszcuk*, 517 F.2d at 59. Rather, "the existence of the fact that confers federal jurisdiction need not be one in the mind of the actor at the time he perpetrates the act made criminal by the federal statute," *United States* v. *Feola*, 420 U.S. 671, 676-677 n.9 (1975), since "[t]he concept of criminal intent does not extend so far as to require that the actor understand not only the nature of his act but also its consequence for the choice of a judicial forum." *Id.* at 685; see *United States* v. *X-Citement Video, Inc.*, 115 S. Ct. 464, 469 n.3 (1994); *United States* v. *Yermian*, 468 U.S. 63, 68-69 (1984).[3]

[3] In any event, RICO is a particularly implausible candidate for a vagueness claim, because no one can be convicted of violating RICO unless he commits or agrees to the commission of at least two specified felonies and satisfies other requirements. As this Court noted in the context of a prosecution under a similar state law, "it would seem that the RICO statute in inherently *less* vague than any [law defining the predicate felonies]: a prosecution under the RICO law will be possible only when all the elements of [the predicate] offense are present, and then some." *Fort Wayne Books, Inc.* v. *Indiana*, 489 U.S. 46, 59 n. 7 (1989).

Respondent also appears to suggest that a more limited reading of RICO is required by the rule of lenity. Br. 26 n. 25. The rule of lenity has no application here. That principle does not displace the normal tools of statutory construction in determining Congress' intent. See *Reves* v. *Ernst & Young*, 113 S. Ct. 1163, 1172 & n.8 (1993). As this Court has noted, the rule of lenity becomes applicable only if, "after seizing everything from which aid can be derived, the Court is left with an ambiguous statute." *Smith* v. *United States*, 113 S. Ct. 2050, 2059 (1993) (internal quotation marks and brackets omitted). Here, Congress conveyed its purpose quite clearly by using a term of art that invokes "the full sweep of its constitutional authority." *Polish National Alliance* v. *NLRB*, 322 U.S. at 647. There is accordingly no "grievous ambiguity or uncertainty," *Chapman* v. *United States*, 500 U.S. 453, 467-468 (1991) (internal quotation marks omitted); see also *Scarborough* v. *United States*, 431 U.S. at 577, calling for the application of lenity.

4. Finally, respondent suggests (Br. 25) that a restrictive interpretation of RICO is necessary "to preserve the delicate balance between state and federal power." Nothing in RICO, however, deprives States of authority to prosecute conduct that violates their laws. See Pub. L. No. 91-452, § 904(b), 84 Stat. 947, 18 U.S.C. 1961 note ("[n]othing in this title shall supersede any

provision of * * * State * * * or other law imposing criminal penalties * * * in addition to those provided for in this title"). As this Court has noted, "under RICO, the States remain free to exercise their police powers to the fullest constitutional extent in defining and prosecuting crimes within their respective jurisdictions." *United States* v. *Turkette*, 452 U.S. 576, 586 n.9 (1981).

Moreover, the principle that criminal statutes should be construed so as to avoid invading areas of traditional state concern "only appl[ies] 'when we are uncertain about the statute's meaning,'" *United States* v. *Culbert*, 435 U.S. at 379 (quoting *Scarborough* v. *United States*, 431 U.S. at 577), and that consideration is therefore inappropriate where "Congress has conveyed its purpose clearly." *United States* v. *Culbert*, 435 U.S. at 379; see also *Perrin* v. *United States*, 444 U.S. 37, 50 (1979). As this Court noted in *United States* v. *Turkette*, *supra*, Congress left no doubt that it intended to alter the federal-state balance when it enacted RICO: "[T]he language of [RICO] and its legislative history indicate that Congress was well aware that it was entering a new domain of federal involvement through the enactment of this measure. Indeed, the very purpose of the Organized Crime Control Act of 1970 was to enable the Federal Government to address a large and seemingly neglected problem. The view was that existing law, state and federal, was not adequate to address the problem, which was of national dimensions." 452 U.S. at 586.[4]

---

[4] Respondent errs in suggesting (Br. 19 n.18) that the "plain statement" requirement of *Gregory* v. *Ashcroft*, 501 U.S. 452 (1991), is applicable to RICO's regulation of structured and complex criminal conduct. In any event, Congress's use of the phrase "affecting commerce" and the findings accompanying RICO leave no doubt that Congress intended to regulate all criminal activities involving enterprises within the reach of the Commerce Clause power.

In the end, respondent's argument reduces to questioning the wisdom of Congress in invoking its full constitutional authority to deal with matters that respondent believes can adequately be handled by State authorities. Br. 28-29 & n.26. That is "an argument to be addressed to Congress, not to this Court." *Harrison* v. *PPG Industries, Inc.*, 446 U.S. 578, 593 (1980). For "[t]he short answer to [it] is that the effectiveness of existing laws in dealing with a problem identified by Congress is ordinarily a matter committed to legislative judgment. Congress considered the effectiveness of existing legislation and concluded that additional measures were necessary." *Hodel* v. *Virginia Surface Mining & Recl. Ass'n*, 452 U.S. 264, 283 (1981). There is no room for judicial inquiry into the wisdom of that choice.

* * * * *

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

FEBRUARY 1995

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

No. 94-251

UNITED STATES OF AMERICA, *Petitioner*

v.

JUAN PAUL ROBERTSON, *Respondent*

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICUS CURIAE SUPPORTING RESPONDENT

EPHRAIM MARGOLIN*
240 Stockton St., 3d Floor
San Francisco, CA 94108
(415) 421-4347

JON MAY
3225 Aviation Avenue
Suite 600
Coconut Grove, FL 33133
(305) 285-5548

Attorneys for Amicus Curiae

*Counsel of Record

RECEIVED
JAN 17 1995
OFFICE OF THE CLERK
SUPREME COURT, U.S.

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the Racketeer Influenced and Corrupt Organizations Act can be applied to activities that do not have a substantial effect on interstate commerce.

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

INTEREST OF AMICUS 2

SUMMARY OF ARGUMENT 2

ARGUMENT 3

THE DECISION OF THE NINTH CIRCUIT SHOULD BE AFFIRMED WHERE THE GOVERNMENT FAILED TO DEMONSTRATE THAT THE ACTIVITIES OF RESPONDENT'S GOLD MINING ENTERPRISE HAD A SUBSTANTIAL EFFECT UPON INTERSTATE COMMERCE AS REQUIRED BY PRIOR DECISIONS OF THIS COURT 3

A. The RICO Act Does Not Apply To Investments In Commerce Per Se But Rather To Investments By Organized Crime In Business Enterprises That Operate In Interstate Commerce Or Have A Substantial Effect Upon Interstate Commerce 4

B. Where Congress Has Not Sought To Regulate An Entire Industry, Any Business Activity Sought To Be Regulated Or Proscribed Must Be Shown To Have A Substantial Effect Upon Interstate Commerce 6

CONCLUSION 12

TABLE OF AUTHORITIES

CASES

Consumer Product Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102 (1980) 4

Heart of Atlanta Motel Inc., v. United States, 379 U.S. 241 (1964) 8

Mandeville Island Farms, Inc. v. American Crystal Sugar Co. 334 U.S. 219 (1948) 8

Maryland v. Wirtz 392 U.S. 183 (1968) 9, 10

NLRB v. Reliance Fuel Oil Corp., 371 U.S. 224 (1963) 5

Polish National Alliance v. NLRB, 322 U.S. 643 (1944) 5

Russell v. United States, 471 U.S. 858 (1985) 5

Scarborough v. United States, 431 U.S. 563 (1977) 8

United States v. Allen, 656 F.2d 964 (4th Cir. 1981) 10

United States v. American Bldg. Maintenance Industries, 422 U.S. 271 (1975) 8

United States v. Darby, 312 U.S. 100 (1941) 7, 8

United States v. Muskovsky, 863 F.2d 1319 (7th Cir. 1988) 10

United States v. Robinson, 763 F.2d 778
(6th Cir. 1985) 10

United States v. Turkette,
452 U.S. 576 (1981) 4

United States v. Wrightwood Dairy Co.,
315 U.S. 110 (1941) 7, 8

Wickard v. Filburn, 317 U.S. 111 (1942) 7, 8, 9

CONSTITUTION AND STATUTES

U.S. Constitution,
Art. I, § 8, Cl. 3 . . . . . 3, 10
Art. I, § 8, Cl. 18 9

Racketeer Influenced and Corrupt Organizations Act,
18 U.S.C. 1962 5
18 U.S.C. 1962(a) 4, 5
18 U.S.C. 1962(b) 5
18 U.S.C. 1962(c) 5

Organized Crime Control Act of 1970 6

MISCELLANEOUS

H.R. No. 1549, 91st Congress, 2d Sess. (1970) 6

S. Rep. No. 617, 91st Cong., 1st Sess. (1969) 6

The Federalist, No. 33 at 204 (Alexander Hamilton)
(Jacob E. Cooke ed. 1961) 9

The Federalist, No. 44 at 304 (James Madison)
(Jacob E. Cooke ed. 1961) 9

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

No. 94-251

UNITED STATES OF AMERICA, *Petitioner*

v.

JUAN PAUL ROBERTSON, *Respondent*

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICUS CURIAE SUPPORTING RESPONDENT

This amicus brief is filed pursuant to Rule 37 of the United States Supreme Court. Both petitioner and respondent have granted amicus consent to file this brief, and the letters of consent have been filed with the Clerk of the Court.

INTEREST OF AMICUS

The National Association of Criminal Defense Lawyers (NACDL) is a non-profit corporation which currently has a membership of more than 8,000 attorneys and 28,000 affiliate members in 50 states. The American Bar Association recognizes the NACDL as an affiliate organization and awards it full representation in its House of Delegates.

The NACDL was founded over 25 years ago to promote study and research in the field of criminal defense law; to disseminate and advance knowledge of the law in the area of criminal practice; and to encourage the integrity, independence, and expertise of defense lawyers in criminal cases. Among the NACDL's stated objectives is the proper administration of criminal justice. Thus, the members of the NACDL have a vital interest in insuring that the integrity of the federal and state systems of criminal justice are protected. This includes an interest in insuring the proper delineation of the powers that are exercised by the separate federal and state sovereigns against citizens accused of crime.

SUMMARY OF ARGUMENT

The RICO Act was drafted with the goal of reaching those racketeering enterprises whose activities have a substantial effect on interstate commerce. The goal of the RICO Act is not to strike at investments in commerce per se, but to eliminate the infiltration of racketeering into legitimate organizations which operate in interstate commerce. It is a misuse of the statute to apply it to an investment which has only a tangential connection with interstate commerce.

Congress's power pursuant to the Commerce Clause was never intended to be used by the federal government to regulate a local business merely because that business may have some effect on interstate commerce. If this were the proper construction of the commerce clause, virtually no businesses would be immune from regulation or proscription by the federal government. This Court has recognized that Congress's Commerce Clause power only extends to local businesses when they have a substantial and harmful effect upon commerce.

ARGUMENT

THE DECISION OF THE NINTH CIRCUIT SHOULD BE AFFIRMED WHERE THE GOVERNMENT FAILED TO DEMONSTRATE THAT THE ACTIVITIES OF RESPONDENT'S GOLD MINING ENTERPRISE HAD A SUBSTANTIAL EFFECT UPON INTERSTATE COMMERCE AS REQUIRED BY PRIOR DECISIONS OF THIS COURT

In seeking to overturn the decision of the Ninth Circuit below, the United States has sought to have this Court adopt a radical and dangerous interpretation of the Commerce Clause. See U.S. Constitution, Article I, Section 8, Clause 3. In its argument to this Court, the government has advanced a theory of Commerce Clause jurisprudence that threatens to undermine principles of federalism which have been the foundation of our civil liberty; providing the national government with virtually unlimited power to regulate the lives and daily activities of citizens and businesses which have little or no effect upon interstate commerce.

A. The RICO Act Does Not Apply To Investments In Commerce Per Se But Rather To Investments By Organized Crime In Business Enterprises That Operate In Interstate Commerce Or Have A Substantial Effect Upon Interstate Commerce

The parties are in agreement that the basic rule of statutory construction which this Court must apply herein is the principle that the language of a statute "must ordinarily be regarded as conclusive." *United States v. Turkette*, 452 U.S. 576, 580 (1981)(quoting *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980); see Gov. Br. p. 10. In this case, the statute in question criminalizes the use or investment of income derived from a pattern of racketeering activity in the "acquisition of any interest in, or the establishment or operation of, any enterprise, which is engaged in, or the activities of which affect, interstate or foreign commerce." 18 U.S.C. 1962(a). According to the United States, this language demonstrates the intent of Congress to exercise its full constitutional authority under the Commerce Clause. A far more natural interpretation of this language, however, is that Congress sought to target only those enterprises that have an effect upon interstate commerce.

This distinction, though subtle, is crucial. Congress could have declared unlawful the investment of income derived from racketeering activity in any enterprise, even enterprises that had absolutely no effect upon interstate commerce. It chose not to. Instead Congress chose to limit RICO's reach to those enterprises that had such an effect.

The government contends that in using the language "engaged in, or the activities of which affect, interstate or

foreign commerce," Congress evinced an intent to exercise its broadest powers under the Commerce Clause. See e.g., *Russell v. United States*, 471 U.S. 858, 859 (1985); *NLRB v. Reliance Fuel Oil Corp.*, 371 U.S. 224, 226 (1963); *Polish National Alliance v. NLRB*, 322 U.S. 643, 647 (1944). But the government cites no case that holds that this judicially created rule of construction is to be followed where the statute on its face reflects a different intent.

Title 18 U.S.C. Section 1962 does not make racketeering per se a federal offense. Only where the pattern of racketeering activity is conducted through an enterprise "engaged in, or the activities of which affect, interstate or foreign commerce" is there a crime. 18 U.S.C. 1962(c). Similarly, racketeering activities used as a means to obtain an interest in or control over an enterprise are not unlawful unless the enterprise is "engaged in, or the activities of which affect, interstate or foreign commerce." 18 U.S.C. 1962(b). Finally, the investment of income from racketeering activity, even racketeering activity by an enterprise engaged in interstate commerce under 1962(c), is not a crime unless the enterprise is "engaged in, or the activities of which affect, interstate or foreign commerce." 18 U.S.C. 1962(a).

Had 18 U.S.C. 1962 made it a crime for a racketeering enterprise (as defined under 1962(c)) to invest racketeering income in any business, then Congress would not merely have expressed an intent "to exercise its full power under the Commerce Clause[,]" *Russell v. United States*, 471 U.S. at 859, but would have actually done so. If anything, the plain language of RICO in this instance reflects a more specific intent.

To whatever extent Congress may have sought to exercise broader powers under other provisions of the

Crime Control Act, those expressions of intent cannot be used to supplant the plain language and structure of the RICO Act. See H.R. No. 1549, 91st Congress, 2d Sess. 70 (1970); Gov. Br. p. 14. To the extent that legislative pronouncements are relevant to this inquiry, this Court should look to the Senate and House reports directed at this particular law. The Senate and House Committee reports which apply specifically to RICO (as opposed to the Crime Control Act overall), state that the purpose of RICO is "the elimination of the infiltration of organized crime and racketeering into legitimate organizations operating in interstate commerce." S. Rep. No. 617, 91st Cong., 1st Sess. 76 (1969); H.R. Rep. No. 1549, 91st Cong., 2d Sess. 57 (1970), reported in 2 U.S. Code Cong. & Admin. News 4007, 4033 (1970).

In the face of such legislative expressions of intent and in view of the plain language and structure of the act, there is no need for this Court to consider rules of construction which have been developed in other contexts. Contrary to the government's argument, it is plain that RICO does not reach investments in commerce per se. And as we will see from the argument that follows, RICO only applies to investments in enterprises that have a substantial effect upon interstate commerce.

B. Where Congress Has Not Sought To Regulate An Entire Industry, Any Business Activity Sought To Be Regulated Or Proscribed Must Be Shown To Have A Substantial Effect Upon Interstate Commerce

The United States claims that Congressional power to regulate interstate commerce, necessarily extends to "'relatively small and entirely local operation[s].'" Gov. Br.

p 17. This is a serious misreading of this Court's precedents. As this Court observed in *United States v. Darby*, "Congress has sometimes left it to the Courts to determine whether intrastate activities have the prohibited effect on the commerce, as in the Sherman Act. . . . And sometimes Congress itself has said that a particular activity affects the commerce." 312 U.S. 100, 120 (1941). Where Congress has sought to regulate an entire industry which is engaged in interstate commerce, this Court has found it unnecessary for there to be any further demonstration that a local operation within that industry had any particular effect upon interstate commerce. *Id.* On the other hand, where Congress has sought only to regulate or proscribe conduct engaged in by businesses or individuals, an impact upon interstate commerce must be shown. In either case, Congress must indicate or the Courts must find a substantial effect upon interstate commerce.

Wickard v. Filburn, 317 U.S. 111 (1942); *United States v. Wrightwood Dairy Co.* 315 U.S. 110 (1941); *United States v. Darby*, 312 U.S. 100 (1941), are all classic illustrations of this principle. In each case Congress sought to protect entire industries: in the case of *Wickard v. Filburn*, the domestic and international sale of wheat; in the case of *Wrightwood Dairy*, the market price of milk; and in the case of *Darby*, the treatment of workers in all industries. In such instances even purely local activities can have effects nationwide. As this Court observed in *Wickard*, "That appellee's own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial." 317 U.S. at 127-128. Similarly, in *Darby*, this Court stated that, "Congress, to attain its objectives in the suppression of nationwide competition in interstate commerce by goods produced

under substandard labor conditions, had made no distinction as to the volume or amount of shipments in the commerce or of production for commerce by any particular shipper or producer. It recognized that in present day industry, competition by a small part may affect the whole and the total affect on the competition of many small producers may be great." 312 U.S. at 123.

Even where Congress has acted to the fullest extent of its Commerce Clause power, even where Congress has sought to regulate an entire industry, that power can only be exercised if there is shown that the industry has a substantial impact upon interstate commerce. As this Court has repeatedly stated, "'[T]he reach of that power extends to those intrastate activities which in a substantial way obstructs the exercise of the granted power.'" *Wickard v. Filburn*, 317 U.S. 111, 124 (1942), citing *United States v. Wrightwood Dairy Co.* 315 U.S. at 119 (1941). See also *Scarborough v. United States*, 431 U.S. 563, 571 (1977)(substantial effect required); *United States v. American Bldg. Maintenance Industries*, 422 U.S. 271, 280 (1975)(substantial effect required); *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.* 334 U.S. 219 (1948)(substantial effect required); *United States v. Darby*, 312 U.S. at 118 (1941)(substantial effect required). Again, this principle was repeated in *Heart of Atlanta Motel Inc., v. United States*, 379 U.S. 241 (1964) where this Court stated, "[T]he power of Congress to promote interstate commerce also includes the power to regulate the local incidents thereof, including local activities in both the state of origin and destination, which might have a substantial and harmful effect upon commerce." *Id.* at 258.

Plainly, these decisions do not support the government's argument as advanced herein. Were this Court to adopt the government's analysis, few businesses would

be immune from regulation or proscription by the federal government. In today's world it is nearly impossible to engage in any form of business without having some impact upon interstate commerce. The purchase of office supplies and equipment necessarily entails the movement of items across state and national boundaries. The use of telephones invariably involves equipment (such as telephone lines, microwave transmitters, satellites) operating in international commerce. Indeed transmissions intrastate may adversely impact upon the ability of others to send or receive electronic communications interstate. Finally even ordinary and seemingly local banking transactions may have effects or cause the use of instrumentalities operating in interstate commerce.

The United States seeks to expand the reach of the Commerce Clause through the Necessary and Proper Clause. See Article I, Section 8, Clause 18. But it is clear that the founding fathers did not intend that the Necessary and Proper Clause be used to expand the scope of the enumerated powers but only to insure that within the proper exercise of such powers Congress had sufficient means to make them work. Alexander Hamilton went to great lengths to reassure those fearful of its use that this Clause was not intended to destroy local government or exterminate liberty. *The Federalist*, No. 33 at 204 (Jacob E. Cooke ed. 1961). James Madison made a similar argument: "For in every new application of a general power, the particular powers, must always necessarily vary with that object; and be often properly varied whilst the object remains the same. *The Federalist*, No. 44 at 304. Madison made clear that the purpose of this clause was to avoid having to write "a complete digest of laws on every subject to which the Constitution relates." *Id.* As this Court noted in *Maryland v. Wirtz*, "Neither here nor in *Wickard* has the Court declared that Congress may use a relatively trivial

impact on commerce as an excuse for broad, general regulation of state or private activities." 392 U.S. 183, 196 n. 27 (1968).

If any impact upon interstate commerce suffices to satisfy the Commerce Clause, the Constitution would place no limit upon the power of Congress to legislate. It would in fact grant Congress the authority to exercise unlimited control over all business activity within the nation. Indeed, the threat posed by the government's theory is not merely an implication which can be drawn from the government's argument. This Court need look no further than the government's citation to the decisions in *United States v. Muskovsky*, 863 F.2d 1319 (7th Cir. 1988), *United States v. Robinson*, 763 F.2d 778 (6th Cir. 1985), and *United States v. Allen*, 656 F.2d 964 (4th Cir. 1981) to see the danger made manifest. See Gov. Br. p. 18-19. In these cases (as well as in the others cited by the United States in its footnote 5) the courts found the interstate nexus satisfied where the enterprise did nothing more than purchase material or supplies or office equipment that originated out of state.

The immense power claimed by the United States does not comport with either the text or purpose of the Commerce Clause. The Constitution gives Congress the power "To regulate Commerce with foreign Nations, and among the several States, and with Indian Tribes." U.S. Const. Article. I, Section 8, Clause 3. It does not give Congress the power to regulate commerce *per se* and anything having an effect on commerce.

Significantly, the United States does not contend that Respondent's gold mining operation in and of itself had a

significant effect upon interstate commerce.[1] Instead the United States has chosen to rest its entire argument upon principles this Court has adopted for legislation pertaining to entire industries; principles which have no application to statutory schemes such as that presented herein. Therefore should this Court agree that the government was required to demonstrate that Respondent's operation had a significant effect upon interstate commerce, this Court should affirm the decision of the Ninth Circuit below.

---

[1] The government argues that Respondent's mining operation was part of a much larger market in precious metals and that as a result the enterprise, "'[E]ven if 'trivial' when considered in isolation, comes within the reach of the Commerce Clause when it is part of a class of activities that in the aggregate substantially affects interstate or foreign commerce." Gov. Br. p. 19-20. As we have shown above, this argument would only apply if the statute at bar were part of a Congressional effort to regulate an industry itself, such as the mining industry. In such circumstances Respondent's operation, no matter how minimal its impact upon intestate commerce, would fall within the power of Congress to regulate. The government's misapplication of that rule herein would permit the Commerce Clause nexus to be satisfied through simple arithmetic. It is hard to imagine any business activity that is not part of a larger nationwide market. But if that is the test, then "interstate" is no longer part of the Interstate Commerce Clause. The Constitution will be rewritten to authorize Congress to regulate commerce not just "among the several states" but instead "within the several states."

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

Ephraim Margolin*
LAW OFFICES OF EPHRAIM MARGOLIN
240 Stockton Street, Third Fl.
San Francisco, California 94108
Phone (415) 421-4347

Jon May
MAY & COHEN, P.A.
Bayview Plaza
3225 Aviation Ave., Ste. 600
Coconut Grove, FL 33133
(305) 285-5548

Attorneys for Amicus Curiae

*Counsel of Record

January 9, 1995